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The case of Justice v. Lairy, recently decided by the Appellate Court of Indiana, involves questions of special interest to attorneys as members of law partnership firms. It is held that where an attorney at law, who is a member of a law firm, becomes a circuit judge, the partnership is immediately dissolved, since, under the statute of that State, a circuit judge can neither directly nor indirectly practice law in any of the courts of the State, nor give counsel or advice in relation to any business in such courts; that where one member of a law firm becomes a circuit judge, it is immaterial, as affecting the question of dissolution, whether the other member of the firm consented to such withdrawal; that in an action by a member of a law firm to recover for work which had been completed after he had left the firm, the good will of the firm, though a proper item on accounting between the partners, cannot be considered; that where an attorney seeks to recover for work done in a case after his partner had left the firm, it is not an adjudication of partnership accounts to direct a certain sum to be paid for such services; and that where one member of a law firm has withdrawn, a contract of employment of such firm is of a divisible nature, under which a recovery may be had for services, of which the client has already had the benefit, but such withdrawing partner can have no interest in fees for services rendered by the remaining member of the firm in concluding that particular business. As regards the main question in this case, the court while not declaring that a different rule should in every instance be applied in closing up the business of a law firm from that applied in other partnerships, yet says that there are sound reasons for holding that when an attorney at law, who is a member of a law firm, becomes a judge of a circuit or other court, at that instant the partnership is dissolved, and that a contract of employment in pending business in such a case is of a divisible nature, under which a recovery may be had for services of which the client has already had the benefit, but that such a person can have no interest in any fees for services rendered by the remaining member of the firm in concluding that particular business.

A decision affecting the validity of the United States statutes for the inspection of meat animals, alive and slaughtered, under the auspices of the Department of Agriculture, has been rendered by the United States District Court, Western District of Missouri, in the case of United States v. Boyer, 85 Fed. Rep. 425. The case arose upon the indictment of one Boyer for offering money and regular salaries to assistant meat inspectors to induce them to allow employees of a packing house to carry away condemned carcasses. The defendant's attorney demurred to the indictment on the ground that the carcasses which were inspected were not subjects of interstate commerce, and that therefore the government had no right to impose police regulations at the packing houses. His contention was sustained by the court, which said that the powers of congress were expressly granted or indicated by direct implication, and that the constitution made no provision for the passage of laws creating packing-house inspection. Congress, the court held, regulated commerce with foreign nations among the several States and with the Indian tribes, but the killing of beef at packing houses could not be classed as interstate commerce, and congress had no power to interfere with matters that should be controlled by the States; in other words, that the specific duty of inspecting animals and carcasses in slaughter houses and similar establishments is exclusively a State and cannot be made a federal function. It was sought on the part of the prosecution to deduce the requisite authority of congress to legislate by implication from the "General Welfare Clause," and also the "Commerce Clause," of the federal constitution. The court, in holding that the "General Welfare Clause" does not furnish the necessary power, takes the broad ground, following Judge Story in his work on the constitution, that such clause "contains no grant of power whatsoever, but it is a mere expression of the ends and purposes to be effected by the preceding power of taxation."

NOTES OF IMPORTANT DECISIONS.

MALICIOUS PROSECUTION—LIABILITY OF MASTER FOR TORTS OF SERVANT.—In Little Rock Traction & Electric Co. v. Walker, 45 S. W. Rep. 57, decided by the Supreme Court of Arkansas, it was held that a street car company is not liable for the act of its conductor in prosecuting a passenger for violation of a city ordinance making it a misdemeanor for any person to ride on a street car without paying his fare, in the absence of express authority from the company to the conductor to institute such prosecution. The court took the ground that it will not be presumed that because a street car conductor has authority from his company to put people off his car for refusing to pay fare, he has also authority to arrest and prosecute them therefor.

PLEADING—ABATEMENT — ANOTHER ACTION PENDING—EFFECT OF DISMISSAL.—In Wilson v. Milliken, 44 S. W. Rep. 660, decided by the Court of Appeals of Kentucky, it is held that an action pending in a United States court may be pleaded in abatement to a subsequent action commenced between the same parties in the State court in the same district for the same subject-matter and the same kind of relief, since the jurisdiction of the United States court is domestic, in relation to the jurisdiction of the State court within the same territorial limits; that under common law pleading, there is no replication to a plea of former action pending, but *nul tiel* record, and that the objection of a former suit pending is removed by a dismissal of such suit, even after the plea in abatement in a second suit, where such second action was not brought for vexatious purposes. Du Relle, J., dissents from the conclusion of the court.

RECEIVERS — PRIVATE CORPORATIONS — LABORERS' LIENS — PRIORITY — ASSIGNEES.—The Supreme Court of Alabama, in Drennan v. Mercantile Trust & Deposit Co., 23 South. Rep. 164, decide that employees of a private mining and coke manufacturing corporation, performing labor within six months prior to the appointment of a receiver under foreclosure of a mortgage covering all the property and income of the corporation, are entitled to be paid out of the gross earnings of the corporation into which such labor had entered for such time, coming into such receiver's hands; that where interveners, as assignees of the claims of laborers against a mining corporation, claim a lien superior to a mortgage upon the earnings of the corporation, their averment that about $40,000 was due the corporation, into which the labor had entered, when a receiver was appointed under foreclosure of the mortgage, is not objectionable because made on information and belief that an assignee of laborers' claims has the same right to assert priority over a mortgage upon the employer's property as the laborers had, and that a petition of intervention, praying that notice of its filing be given to the parties to the pending suit, is sufficient in respect of making parties to the intervention.

MUNICIPAL CORPORATION—DEFECTIVE SIDEWALK—ICE.—In McGowan v. City of Boston, 49 N. E. Rep. 633, decided by the Supreme Judicial Court of Massachusetts, it appeared that a water conductor discharging water across a sidewalk to a gutter had been in the same place for two or three years, and in the winter time water therefrom repeatedly froze on the sidewalk at that place. It was held that under the statute requiring cities to keep their ways reasonably safe, a city is liable for injuries to a person by his falling on ice which had been on the sidewalk at that place for three or four days. The court says: "The case principally relied upon by the defendant is that of Billings v. Worcester, 102 Mass. 329, where water ran from a rain conductor outside the line of the street upon the pavement inside this line, and froze, forming a slippery place, and the town was held by a divided court not to be liable. This was put upon the ground that under Gen. St. ch. 44, § 22, the liability of towns was a special and peculiar one; that it was not based upon the rules of reasonable care, and except in regard to notice, which required reasonable notice to the town if the defect had not existed for 24 hours, the liability of the town was not at all affected by the question of its diligence or notice; and it was said of this rule: 'It permits no excuse, not even "the act of God or the public enemy."' It was held that the statute did not apply to mere smooth ice, whatever its origin. In Stanton v. Springfield, 12 Allen, 566, it was held that mere smooth ice did not constitute a defect in a way, and it was said by Mr. Justice Hoar: 'The formation of thin, but slippery, ice, in our climate, is an effect which may be so suddenly and extensively produced, and which may continue or be renewed for such a length of time, that it would be extremely difficult, if not impossible, for towns to make adequate provision against it.' A previous decision of the court was explained in this way: 'In Hall v. Lowell, 10 Cush 260, two conductors from the roofs of two houses came together, and, by reason of their not being tight, let upon the sidewalk water, that often froze there in the night, and continued for several weeks together. There was therefore a special cause for the formation of ice at the spot, against which the city might have guarded.' We have, however, no occasion to consider whether the case of Billings v. Worcester was correctly decided. While the general rule established by it was subsequently followed in McAuley v. Boston, 113 Mass. 503, towns were held liable for a defective slope covered with smooth ice (Pinkham v. Topsfield, 104 Mass. 78), and for a gutter running across the sidewalk (Fitzgerald v. Woburn, 109 Mass. 204). We assume, however, that, while the general statutes were in force, the rule stated in Billings v. Worcester was the law of the common-

wealth. But by chapter 234, St. 1877, sections 1-22, ch. 44, Gen. St., were repealed; and, by sections 1 and 2 of the new statute, towns and cities were required only to keep their ways reasonably safe, and the provision in regard to 24 hours was omitted. The provisions of St. 1877 were incorporated in Pub. St. ch. 52, §§ 1, 18, which were in force when the accident in this case happened. In Post v. Boston, 141 Mass. 189, 4 N. E. Rep. 815, the distinction between the provisions of the general statutes and those of St. 1877, ch. 234, were clearly pointed out by Mr. Justice C. Allen, who, speaking of the latter statute, said: 'In the first place, it did away with the absolute liability imposed on towns where the defect had existed for twenty-four hours, and exonerated them from liability in all cases where there had been no lack of proper diligence on their part. * * * And it substituted therefor a liability for an injury or damage received through a defect which might have been remedied, or an injury or damage which might have been prevented, by reasonable care and diligence on the part of the town, if such town had reasonable notice of the defect, or might have had notice thereof by the exercise of proper care and diligence on its part, although the defect had not existed for any particular length of time, and although the town had no actual notice thereof.' In that case a cesspool and its cover, in a highway, were so constructed that, in a heavy rain, the water which would ordinarily flow into the cesspool would lift off the cover, and leave a hole, into which a person might fall, and this liability to become defective was held to be a defect, under Pub. St. ch. 52, § 18, although a different rule was established in a case under the general statutes. Monies v. Lynn, 124 Mass. 165, 171. In Blake v. Lowell, 143 Mass. 296, 9 N. E. Rep. 627, where the defect was an accumulation of ice and snow upon a sidewalk, which had accumulated in the vicinity of a conductor extending from the eaves of a building abutting upon a sidewalk to a gutter across a sidewalk, the defendant requested a ruling that the origin of the ice was not material on the question whether the ice constituted a defect. It was found as a fact that the ice was a defect without reference to its origin, and therefore the request of the defendant became immaterial. It was, however, said by Mr. Justice Devens, in delivering the opinion of the court: 'We do not intend to intimate that, even if material, the request should have been granted, especially in view of St. 1877, ch. 234, § 2 (Pub. St. ch. 52, § 18).' In Adams v. Chicopee, 147 Mass. 440, 18 N. E. Rep. 231, it was held that if smooth, level, and slippery ice is formed upon the surface of a sidewalk, or in depressions therein, by reason of its improper construction or of its condition, a defect may be found to exist such as will render a town liable for an injury caused thereby. It is said by Mr. Justice Knowlton, in delivering the opinion of the court: 'In the decision in Billings v. Worcester, 102 Mass. 329, there is nothing in conflict with this doctrine, although some of the reasoning in the opinion seems to lead away from it; but through the change in the law by the enactment of the statute of 1877, ch. 234, that reasoning has become inapplicable to recent cases.' See Olson v. Worcester, 142 Mass. 536, 8 N. E. Rep. 441; Stoddard v. Inhabitants of Winchester, 157 Mass. 567, 573, 32 N. E. Rep. 948. As the law was at the time of the accident, we are of opinion that the cases we have cited show that it was the duty of the city to use reasonable care and diligence, not only to remedy defects, but to guard against causes existing within the limits of the way which were likely to produce such defects. By St. 1892, ch. 419, §§ 66, 136, 137, the city of Boston had full power to prevent water conductors on houses from discharging water upon sidewalks. In Hughes v. City of Lawrence, 160 Mass. 474, 36 N. E. Rep. 485, and Cronin v. City of Holyoke, 162 Mass. 257, 38 N. E. Rep. 445, the water came from a point outside the limits of the way, and they have no application to the case before us. Exceptions overruled."

LANDLORD AND TENANT — NEGLIGENCE — BREACH OF CONTRACT TO REPAIR.—It is held by the Supreme Court of New York, in Schick v. Fleishhauer, that a tenant is not at liberty, if the landlord fails to keep his contract to repair the premises, to permit them to remain in an unsafe condition, and stay there at the risk of receiving injury, and then recover as for negligence against the landlord for injuries suffered. The court said in part: "The only relation between the parties is that of landlord and tenant. It is well settled in this State that no duty rests upon the landlord to repair premises which he has demised, or to keep them in tenantable condition, and that there can be no obligation to repair except such as may be created by the agreement of the landlord so to do. Witty v. Matthews, 52 N. Y. 752. Where such agreement has been made, the measure of damages for the breach of the contract is the expense of doing the work which the landlord agreed to do, but did not. A contract to repair does not contemplate that, as damages for the failure to keep it, any personal injuries shall grow out of the defective condition of the premises; because the duty of the tenant, if the landlord fails to keep his contract to repair, is to perform the work himself and recover the cost in an action for that purpose, or upon a counterclaim in an action for the rent, or, if the premises are made untenantable by reason of the breach of the contract, the tenant may move out and defend in an action for the rent as upon an eviction. Myers v. Barnes, 35 N. Y. 269; Sparks v. Bassett, 49 Super. Ct. Rep. 270; 2 Taylor on Landlord & Tenant (8th ed.), p. 381. The tenant is not at liberty, if the landlord fails to keep his contract to repair the premises, to permit them to remain in an unsafe condition and to stay there at the risk of receiving injury on account of the defects in the premises, and then recover as for negligence for any injuries that he may suffer. Where the sole relation between two parties is contractual in its nature, a breach of the

contract does not usually create a liability as for negligence. In such a case the liability of one of the parties to the other because of negligence is based either on the breach of some duty which is implied as the result of entering into the contractual relation, or from the improper manner of doing some act which the contract provided for; but the mere violation of a contract, where there is no general duty, is not the subject of an action of tort. Courtenay v. Earle, 10 C. B. 83; Tuttle v. Gilbert Manufacturing Co., 145 Mass. 169. As the result of this principle, we conclude that the plaintiff cannot maintain an action against the defendant to recover the damages which she has suffered on the ground of the defendant's negligence in failing to keep his contract to repair. Such is the weight of authority in this country. Miller v. Rinaldo, 21 Misc. Rep. 470; Tuttle v. Gilbert Manufacturing Co., *supra;* Flynn v. Hatton, 43 How. Pr. 333; Spellman v. Bannigan, 36 Hun, 174."

In substantial accord with such New York case is the recent decision of the Supreme Court of New Jersey in Clyne v. Homes, 39 Atl. Rep. 767. It was therein held that, in the absence of a contract, a landlord is not bound to repair, so as to be liable to a member of the lessee's family injured by the falling of a mantelpiece; that a promise of the landlord to the tenant and a member of the latter's household, made after the letting, to make repairs, is without consideration; and that though a lease require the landlord to make repairs, a member of the tenant's family injured by the falling of a mantelpiece out of repair, cannot recover therefor from the landlord.

The following is from the opinion of the New Jersey court:

"These propositions may be considered as settled: First. That an allegation of duty is insufficient; that the facts and circumstances from which the duty arises must be set out in the declaration, and the sufficiency of the pleading must be determined from the facts from which the duty is deducted. Safe Co. v. Ward, 46 N. J. Law, 19; Rader v. Township of Union, 43 N. J. Law, 518; Brown v. Mallett, 5 C. B. 599; Seymour v. Maddox, 16 Q. B. 326. Second. On demise of a house or lands, there is no contract or condition implied that the premises shall be fit and suitable for the use for which the lessee requires them. Murray v. Albertson, 50 N. J. Law, 167, 13 Atl. Rep. 394; Naumberg v. Young, 44 N. J. Law, 331, 344; Mullen v. Rainear, 45 N. J. Law, 520, 523; Heintze v. Bentley, 34 N. J. Eq. 563; Jaffe v. Harteau, 56 N. Y. 398; Tayl. Landl. & Ten. (7th ed.) sec. 382. Bowe v. Hunking, 135 Mass. 380, was a suit brought by the plaintiff, as administrator of his wife, to recover damages for personal injuries occasioned by a defective stairway in a tenement house owned by the defendants, of which she and her husband were tenants. The premises were rented by the husband as tenant at will. There was a defect in the trend of the back stairs, and, the wife coming down this flight of stairs in the evening, the trend gave way, and she was thrown down and received the injuries complained of. The trial judge ruled as matter of law that the action could not be maintained. The court *en banc* sustained the ruling. Field, J., in delivering the opinion of the court, said: 'There is no warranty implied in the letting of an unfurnished house or tenement that it is reasonably fit for use. The tenant takes an estate in the premises hired, and the persons who occupy by his permission or as members of his family cannot be considered as occupying by the invitation of the landlord, so as to create a greater liability on the part of the landlord to them than to the tenant. The tenant is in possession, and he determines who shall occupy or enter the premises.' In Robbins v. Jones, 15 C. B. (N. S.) 221, the defendant was the owner of certain house and premises, and let them to certain persons, to-wit, Smith Allen Jeffs and Augustus Jeffs. On the premises was a certain area adjoining and under a footway leading to the property of the defendant. Whether the footway was a private way to the houses, or a public footway over the premises demised, was a disputed question of fact. Robbins, the plaintiff, on the 10th of February, 1862, was lawfully passing over and along the footway, and, by reason of its dilapidated, dangerous and unsafe condition, he was thrown into the areaway, and severely hurt and injured, from which injuries he died, and the suit was brought by his administratrix, and resulted in a verdict for the plaintiff. This verdict was set aside, and a nonsuit was entered. The court of common bench, in its opinion, delivered by Earle, C. J., used this language: 'It is for the plaintiff to make out that the defendant has been guilty of the breach of some duty which he owed to the deceased, and that thereby the accident was occasioned. Whether he has done so may be considered under the following heads: (1) If the passage over the area be considered as a private way to the houses, then the reversioner is not liable, but the occupier. A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house, and the tenant's remedy is upon his contract, if any. In this case there was none—not that that circumstance makes any difference in our opinion.' The other heads under which the case was considered are not relevant to this pleading. In Mullen v. Rainear, *supra*, the plaintiff was tenant for years of the defendant. While he and his wife were carrying a stove on the balcony, which the tenant had a right to use in connection with the leased premises, the balcony broke down, and by the fall the wife of the plaintiff was injured. The supreme court reversed a judgment in favor of the plaintiff below, on the ground that the court erred in refusing to instruct the jury that the landlady was not bound to make repairs to the balcony unless some agreement on her part was shown. Mr. Justice Dixon, in delivering the

opinion of the court, said: 'There is no implied duty on the owner of a house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation, and no action will lie against him for an omission to do so, in the absence of express warranty or deceit. An obligation on the part of the landlord will not be implied that he shall make substantial repairs because of the premises being in a dangerous condition.'

"The exemption of a landlord from liability for injuries sustained by a tenant by reason of the ruinous condition of the demised premises, where there is neither a contract nor fraud, applies as well to members of the family of a tenant as to those who are on the premises by his consent. 'The subtenant, servant, employee, or even customer of the lessee, is under the same restriction as the lessee himself; because entering under the tenant's title, and not by any invitation, express or implied, from the owner, they assume a like risk.' Tayl. Landl. & Ten. (7th ed.) sec. 175*a*."

THE JOINT AND SEVERAL LIABILITY OF TORT-FEASORS, AND THEIR RELEASE.

The rule is that he who injures another is liable in damages for such injury, and all who are present and encourage others in doing a wrong, causing injury, are liable for the injury caused the same as if done or inflicted by themselves.[1] And if the injury is done by one under the instructions or by contract with another, such person will be liable, though absent.[2] But after the wrong has been done, the mere subsequent approval of it will not create a liability, unless it was done in the interest of the one approving it.[3]

1st. *Joinder of Parties.*—When the action is brought for torts founded on joint contract, or ownership, all the parties must be joined as defendants.[4] If, however, they are acting jointly, or by concert in the matter, they may be jointly or severally sued for the full damage.[5] But if their acts are not joint except as to the result, there being no agreement or concert of action between them, a joint action will not lie. Each must be sued for the damages he has individually caused, and not otherwise.[6] In the case of Schuylkill Nav. & Ry. Co. v. Richards,[7] the Supreme Court of Pennsylvania say: "The plaintiff's intestate was the owner of a dam and water power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with coal dirt, washed down by the stream from the mine above, of several owners, upon Little Schuylkill, Panther Creek and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendant below with the whole injury caused by the filling up of his basin. * * * Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we shall find them jointly sued, the want of concert and the several liability of each would be apparent."[8] However, there seems to be an exception to this rule, for example, in the case of carriers. The non-carrier may be joined with the carrier in a suit for damages caused by a collision, and both held responsible, if both are negligent.[9] The Supreme Court of Minnesota,

[1] Brown v. Perkins, 1 Allen, 89; Little v. Tingle, 26 Ind. 168; Frontz v. Lenhart, 6 Smith (Pa.), 365; U. S. v. Ricketts, 1 Cranch C. C. 164; Cooper v. Johnson, 81 Mo. 483.

[2] Anderson v. Dickie, 26 How. 105; Baxter v. Warner, 6 Hun, 585; Jennings v. Van Schaick, 13 Daily, 438; Fow v. Roberts, 108 Pa. St. 489; Jarvis v. Baxter, 32 N. Y. 109; Wall v. Osborne, 12 Wend. 39.

[3] Cooper v. Johnson, 81 Mo. 483; Grund v. Van Vleck, 69 Ill. 478.

[4] Weall v. King, 12 East, 452; Low v. Mumford, 14 Johns. 426; Mitchell v. Tarbutt, 5 T. R. 65.

[5] Sloggy v. Dilworth, 38 Minn. 179; Williams v. Shildon, 10 Wend. 654; Bard v. Yohn, 26 Pa. St. 482; Chipman v. Palmer, 77 N. Y. App. 51; Wallace v. Drew, 59 Barb. 413; Guille v. Swan, 19 J. R. 381; Wood v. Sutcliffe, 8 Eng. L. Eq. 217; Clark v. Bales, 15 Ark. 452; Woodbridge v. Conner, 49 Me. 353; Calder v. Smalley, 66 Iowa, 219; Nagel v. Mo. Pac. Ry., 75 Mo. 653.

[6] Chipman v. Palmer, 77 N. Y. 51; Sillick v. Hall, 47 Conn. 260; Bard v. Yohn, 26 Pa. St. 482; Schuylkill Nav. & Ry. Co. v. Richards, 57 Pa. St. 142; Seely v. Alden, 61 Pa. St. 302; Auchmutz v. Ham, 1 Denio, 495; Van Steinberg v. Tobias, 17 Wend. 562; Partenheimer v. Van Order, 20 Barb. 479; Wallace v. Drew, 59 Barb. 413; Sloggy v. Dillworth, 38 Minn. 179; Miller v. Highland Ditch Co., 25 Pac. Rep. 550; Blaisdell v. Stephens, 14 Nev. 17; People v. Mining Co., 66 Cal. 138.

[7] 57 Pa. St. 142.

[8] Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; Van Steinberg v. Tobias, 17 Wend. 562; Buddington v. Sherer, 20 Pick. 477; Auchmuntz v. Ham, 1 Denio, 495; Partenheimer v. Van Order, 20 Barb. 479.

[9] Railway Co. v. Harrell, 58 Ark. 454; Mathews v. Del. L. & W. R. Co., 56 N. Y. 34; Colegrove v. Ry. Co., 20 N. Y. 492; Cooper v. Trans. Co., 75 N. Y. 116;

in the case of Flaberty v. Ry. Co.,[10] say: "If the collision was caused directly by the concurrent negligence of both companies, both are responsible. The collision and the injury having been caused directly by the concurrent wrongful acts or omissions of both defendants, all tending to produce the one resulting event complained of, the action against them jointly is maintainable, though there was no concert of action or common purpose between them."[11] The court, in the case of Pugh v. Ry. Co.,[12] say: "So, if an injury is produced, not by design, but by the concurrent acts of negligence of two or more persons, although their acts were distinct and separate, still they incur a joint and separate liability for the injury which they produce."[13] The Supreme Court of the United States, in the case of Railway Co. v. Cummings,[14] held, that: "In the instruction given we find no error. It was, in effect, that if the negligence of the company contributed to, that is to say, had a share in producing the injury, the company was liable, even though the negligence of a fellow-servant of Cummings was contributory also. If the negligence of the company contributed to, it must have necessarily been an immediate cause of the accident, and it is no defense that another was likewise guilty of wrong." The general rule, that there must be concert of action on the part of defendants before they can be properly joined in the same action, is agreed to by all the authorities. But the rule, as given, in Flaberty v. Ry. Co. and Pugh v. Ry. Co., *supra*, seems not to be in exact harmony with the general rule. The reasons given by the authorities, in this class of cases, are not altogether plain. Some of them base the right of joinder on the ground of negligence. But it is right hard to see just why, on that ground two railway companies may be joined as defendants, for an injury they cause; and hold that the parties who filled up the "dam," in the case of Schuylkill Nav. & Ry. v. Richards, *supra*, and the owners of the different mines, who injured the plaintiff's lands, in the case of People v. Mining Co. and Miller v. Highland Ditch Co., *supra*, should not be joined. In each of these cases the right of action against the different parties was recognized. The defendants in each case were guilty of negligence. And so far as the concurrence or concert of action is concerned, one case presents as much as the other, and that the combined action and negligence of all caused the injury, is certain, in each case. The Supreme Court of Pennsylvania, in the case of Klander v. McGrath,[15] puts the matter in a fairly tangible form. The court say: "The plaintiff below declared against the defendant for an injury which she had received, in consequence of the fall of a party-wall negligently sustained by them. The basis of the action was the negligence of the defendants. It is contended now that they could not be held jointly liable. The maintenance of an insecure party-wall was a tort in which they were both participants. The act was single, and it was the occasion of the injury to the plaintiff. It is difficult, therefore, to see why both were not liable and liable jointly. The case is not to be confounded with action for trespass brought for separate acts done by two or more parties defendant. There, if there has been no concert, or common purpose, there is no joint liability. Here the keeping of the wall safe was a common duty, and a failure to do so was a common neglect. The rule often recognized is, that when an injury has resulted from the concurrent negligence of several persons, they are jointly responsible."[16] One rule for the proper joinder of parties defendant may be said to be: where two or more parties have caused an injury, the question is, is each responsible for the whole injury, if so, then all may be joined. But if each is responsible only for the amount of injury caused by himself, separately, then he must be sued separately. On a close analysis of the cases this doctrine will be found to govern; if the pleadings show that the injury caused by the parties defendant would not have occurred, or any part thereof, except for their joint acts, then they may be properly joined. But if it appears that the separate

Railway Co. v. Schacklet, 105 Ill. 364; Carterville v. Cook, 129 Ill. 152; Cuddy v. Horn, 46 Mich. 596; Railway Co. v. Cummings, 106 U. S. 700.

[10] 39 Minn. 328.

[11] Colegrove v. Ry. Co., 75 Am. Dec. 418; Cuddy v. Horn, 10 N. W. Rep. 32; Tompkins v. Ry. Co., 4 Pac. Rep. 1165; Chipman v. Palmer, 77 N. Y. 51; Cooper v. Trans. Co., 75 N. Y. 116; Brown v. Coxe Bros., 75 Fed. Rep. 689.

[12] 39 S. W. Rep. 695.

[13] Cuddy v. Horn, 46 Mich. 603; Barrett v. Ry. Co., 45 N. Y. 628.

[14] 106 U. S. 700.

[15] 35 Pa. St. 128.

[16] Colegrove v. Ry. Co., 20 N. Y. 492.

acts of each, independently of all the rest, would have caused some part of the injury, it will not be proper to join them as defendants, unless it be shown, that their acts were by concert or common understanding. In the case of the railway companies the joinder is permitted, because, but for their concurrent acts or negligence, no injury would have been sustained. While in the injury to the "lands" and "dam," in the cases referred to above, the combined acts of all caused the injury, it is true, yet each individually caused some part of it, and would have done so had the others not been acting. Hence, there being no agreement or concert between them, they are each responsible separately and individually for the damage he had caused, and no more. Where the parties act jointly, or by concert, and an injury is caused by such concert of action, each may be said to cause it, and the parties may be jointly or severally sued for the injury. This is the basis upon which all the authorities say the right of joinder of the defendants rest, and upon this theory each of the defendants are liable for the full damage caused,[17] otherwise only his proportionate part.[18]

2d. *Entitled to Satisfaction.*—The extent of the plaintiff's right to pursue the different wrongdoers is, to some extent, a disputed question. All the authorities are agreed that the plaintiff has a right to pursue them, or some of them, to a satisfaction. But just what is a satisfaction is the point of dispute. It is well settled by the old English cases that an action pursued to judgment against one would bar any proceedings against the others. But such is not the rule in this country. The rule, as first announced in the case of Livingston v. Bishop[19] by Chief Justice Kent, was "that separate suits may be maintained against wrongdoers, and each prosecuted to judgment, and that no bar arises until satisfaction is had." This doctrine is followed by most all the States of the Union, and was settled by the Supreme Court of the United States in the case of Lovejoy v. Murray,[20] where the facts were that the sheriff levied an attachment for Lovejoy & Co. on certain property which belonged to Murray to satisfy another's debt. An indemnity bond was given by Lovejoy & Co., and the property sold under the attachment. Murray sued the sheriff and recovered a judgment for $6.233, and obtained as a credit from the sheriff $830. Afterwards, Murray sued Lovejoy & Co. for the balance, and was allowed to recover. The doctrine of these cases has been followed until it is now practically settled that the plaintiff may maintain as many suits, obtain as many judgments, and sue out as many executions as it may be necessary in order to recover the damages he has sustained; in other words, obtain satisfaction.[21] But only one recovery or satisfaction can be had.[22] The measure of damages is said to be that which aims at actual compensation for the injury inflicted.[23] This, of course, is subject to exceptions in cases where only nominal damages should be allowed, or cases on the other extreme where exemplary damages are permissible.[24]

3d. *The Rights of Tort-feasors Against Each Other.*—The general rule is that, as between wrongdoers, there is no contribution.[25] But this rule is limited and confined to cases where the person seeking redress

[17] Railway Co. v. Case, 9 Bush, 728; Barnett v. Ry. Co., 45 N. Y. 628; Tompkins v. St. Ry. Co., 66 Cal. 163; Nagel v. Mo. Pac. Ry. Co., 75 Mo. 653; Minneapolis Mill Co. v. Wheeler, 31 Mich. 121; Fairbanks v. Kerr, 20 Smith (Pa.), 86; Berry v. Fletcher, 1 Dill. 67; Bell v. Morrison, 27 Minn. 68; Huddleston v. West Bellville, 111 Pa. St. 110; Currier v. Swan, 63 Me. 323.

[18] Chippman v. Palmer, 77 N. Y. 51; Seely v. Alden, 61 Pa. St. 302; Sloggy v. Dillworth, 38 Minn. 179; Miller v. Highland Ditch Co., 25 Pac. Rep. 550; People v. Mining Co., 66 Cal. 138.

[19] 1 Johns. 290.

[20] 3 Wall. 1.

[21] Sheldon v. Kibbe, 3 Conn. 214; McGeher v. Shafer, 15 Tex. 198; Sanderson v. Caldwell, 2 Aiken, 195; Osterhout v. Roberts, 8 Cow. 43; Sharp v. Gray, 5 B. Mon. 4; Blann v. Crocheron, 20 Ala. 320; Knott v. Cunningham, 2 Sneed, 204; Page v. Freeman, 19 Mo. 421; Turner v. Hitchcock, 20 Iowa, 310; Lord v. Tiffany, 98 N. Y. 412; Freeman on Judg., sec. 236.

[22] Turner v. Hitchcock, 20 Iowa, 310; Livingston v. Bishop, 1 Johns. 290; Metz v. Soule, 40 Iowa, 236; Brown v. Kencheloe, 3 Coldw. 192; Hammatt v. Wyman, 9 Mass. 137; Drake v. Mitchell, 3 East, 251; Cocke v. Jennor, Hob. 66; Bird v. Randall, 3 Burr. 1345; Murray v. Lovejoy, 2 Cliff. 191; Snow v. Chandler, 10 N. H. 92; Pogel v. Meilke, 60 Wis. 248; Dufresne v. Hutchinson, 3 Taunt. 117; Westbrook v. Mize, 35 Kan. 299; Lord v. Tiffany, 98 N. Y. 412.

[23] Seely v. Alden, 61 Pa. St. 302; McKnight v. Ratcliff, 8 Wright, 168; Donty v. Bird, 10 Smith (Pa.), 48; Hart v. Evans, 8 Bar. (Pa.) 22; Walker v. Smith, 1 Wash. C. C. R. 154.

[24] Seely v. Alden, 61 Pa. St. 302.

[25] Adamson v. Jarvis, 4 Bing. 66; Cumpston v. Lambert, 18 Ohio, 81; Selz v. Unna, 6 Wall. 327; Armstrong Co. v. Clarion Co., 66 Pa. St. 218; Pursey v. Clary, 32 Md. 245; Keegan v. Hayden, 14 R. I. 175; Miller v. Fenton, 11 Paige, 18; Churchill v. Holt, 131 Mass. 67; Moore v. Appleton, 26 Ala. 633.

must be presumed to have known that he was doing an unlawful act.[26]

4th. *Release and Part Payment.—First. Before Judgment.*—The common law rule is that if two or more persons be bound jointly and severally in an obligation, and the obligee voluntarily and unconditionally release one of them, all are discharged, and either may plead the release in bar.[27] But the legal operation of a release of one or more, of two or more, joint debtors may be restrained by an express provision in the instrument to the effect that it shall not operate as a release of the others.[28] And if, on payment by one or more, satisfaction is accepted in full for the injury complained of, it works a release of all.[29] It has been held that the law considers the one who has paid for the injury caused by him, has satisfied the injured person as to the whole damage received.[30] This doctrine is based upon the theory that there can be no separate estimate of the injury or damage among the several defendants.[31] In the case of Gilpatrick v. Hunter,[32] the court say: "In a joint trespass or tort, each is considered as sanctioning the acts of all the others, thereby making them his own. Each is liable for the whole damage, as though committed by himself alone, and recovery to the full damage may be had against him." On this ground it is said by the Supreme Court of Ohio, in the case of Ellis v. Bitzer,[33] that "an accord and satisfaction of a joint trespass by one is good for all concerned. The act of one of several joint trespassers is the act of all; they all unite to do an unlawful act, and each is responsible for the acts of the others. The plaintiff may elect to sue them jointly or severally, and may pursue them all, or either, until he has obtained satisfaction, but he can have but one recompense for his injury. The fact that there was an agreement, at the time of the release of one or more of the joint trespassers, that their release should not affect the right to pursue the other trespassers, does not change the rule. It has no valid or binding effect. Each joint trespasser being liable to the extent of the injury done by all, it follows, as a necessary consequence, that satisfaction made by one for his liability operates as a satisfaction for the whole trespass, and a discharge of all concerned."[34] But the later, and certainly the better rule, is different. A release under seal at common law presumed full and complete satisfaction for the wrong, and worked a release of all the wrongdoers.[35] In the well considered case of Ellis v. Esson,[36] the Supreme Court of Wisconsin reviewed the authorities and reasons for the rule, and held that "when the release is not a technical one, and is made in connection with an agreement not to prosecute the party to whom given, as to whether or not it works a discharge of all the wrongdoers, is a question which depends on whether or not it was given in full satisfaction of the injury. If it was, then all are discharged, if not, but only as a part satisfaction, then it discharges the others only *pro tanto*.[37]

The rule that a release of one is a release of all might apply where the liability was joint. But the liability of this character of tort-feasers is joint and several, and that rule cannot be applied.[38] It was well said in Ellis

[26] Armstrong Co. v. Clarion Co., 66 Pa. St. 218; Adamson v. Jarvis, 4 Bing. 66; Avery v. Halsey, 14 Pick. 174; Jacobs v. Pollard, 10 Cush. 287; Gridley v. City of Bloomington, 68 Ill. 47; Bailey v. Bussing, 28 Conn. 455; Moore v. Appleton, 26 Ala. 633; Atchinson v. Miller, 2 Ohio St. 203; Peck v. Ellis, 2 Johns. Ch. 131; Gray v. Gas Light Co., 114 Mass. 149.

[27] Whittemore v. Judd Co., 124 N. Y. App. 565; Trotter v. Strong, 63 Ill. 272; Brown v. Ayer, 24 Ga. 288.

[28] Whittemore v. Judd Co., 124 N. Y. App. 565; Hood v. Hayward, 124 N. Y. 1; Burke v. Noble, 48 Pa. St. 168; Rogers v. Hosacks, 18 Wend. 319; Ellis v. Esson, 50 Wis. 138; Morgan v. Smith, 70 N. Y. 537.

[29] Turner v. Hitchcock, 20 Iowa, 310; Tompkins v. St. Ry., 66 Cal. 163; Urton v. Price, 57 Cal. 270; Lord v. Tiffany, 98 N. Y. 412; McGehe v. Shafer, 15 Tex. 198; Mitchell v. Allen, 25 Hun, 543; Ayer v. Ashmead, 31 Conn. 447.

[30] Coke's Litt. 232; Com. Dig. Pleader, 3 M. 12; Ledsham v. Rowe, Hob. 66; Kiffin v. Willis, 4 Mod. 379.

[31] Brown v. Allen, 4 Esp. 158; Wynne v. Anderson, 3 Car. & P. 596.

[32] 24 Me. 18, 41 Am. Dec. 370.

[33] 2 Ohio, 89, 15 Am. Dec. 534.

[34] Denver & R. G. R. Co. v. Sullivan, 41 Pac. Rep. 501; Eastman v. Grant, 34 Vt. 387; Delong v. Curtis, 35 Hun, 94; Mitchell v. Allen, 25 Hun, 543; Tompkins v. St. Ry. Co., 66 Cal. 163; Urton v. Price, 57 Cal. 270; Ayer v. Ashmead, 31 Conn. 447; Turner v. Hitchcock, 20 Iowa, 310; Bell v. Perry, 43 Iowa, 368.

[35] Bronson v. Fitzhugh, 1 Hill, 185; Cocks v. Nash, 9 Bing. 341; Brooks v. Stuart, 9 A. & E. 854.

[36] 50 Wis. 138.

[37] Lovejoy v. Murray, 3 Wall. 1; Bloss v. Plymale, 3 W. Va. 393; Mathews v. Chicopee Mfg. Co., 3 Rob. (N. Y.) 711; Gunther v. Lee, 24 Am. Rep. 504; Pagel v. Meilke, 60 Wis. 248; Smith v. Gayle, 58 Ala. 600; Well on Res Adj., sec. 49.

[38] Ellis v. Esson, 50 Wis. 138; Bowen v. Hastings, 47 Wis. 236.

v. Esson, *supra*, that "Certainly the receipt of a partial satisfaction from one of two or more joint tort-feasers is no injury to the others who are afterwards sued for the trespass. On the other hand it is to his benefit, as he has the advantage of what was paid by his associate in the wrong in reducing the judgment against him." In Bloss v. Plymale,[39] the Supreme Court of West Virginia say: "It was early held that the absolute release of one joint trespasser discharged all who participated in the act, and such is still the rule. But the release pleaded as a discharge for all, that has been given to one only, must be a technical release, under seal, expressly stating the cause of action to be discharged without condition or exception."[40] "So strictly are these technicalities adhered to that no release is allowed by implication, it must be the immediate result of the terms of the instrument, which contains the stipulation; hence it is that a covenant not to sue one joint debtor or trespasser, though it operates between the immediate parties, does not extend to the others." In Gunder v. Lee,[41] it is said: "The release was executed in consideration of $500, and in terms released and discharged Mrs. Lee from all claims of every description for damages accruing or accrued by reason of the wrong complained of; the plaintiff thereby acknowledging themselves 'to be fully paid and satisfied for all and singular the trespasses complained of' by them in a suit then pending against the three defendants jointly." In Smith v. Gayle,[42] it is said by the court that "The general principle is well settled, that if several participate in the commission of a trespass the injured party may sue them jointly or severally, but it has never been supposed he could have several satisfactions. If he sues the trespassers jointly, there can be no apportionment of the damage among them, as the jury may suppose the one or the other to have been more guilty in inflicting the wrong. Whether several or only one participated in the trespass, the injury is single, and it is compensation for the injury the law contemplates. Hence it is a general principle, that a release to one joint trespasser, or an acceptance of satisfaction from one, discharges all. If the purpose is to release a part only of a demand, and not the whole, or one only of several jointly liable, it is a release only *pro tanto*. No other or general effect can be given it than the parties intended. Harper stipulated for his own release, not for the defendants to the suit. It was partial, not entire satisfaction, he proposed to make, and the plaintiff agreed to accept. The present defendants are benefited, not wronged. Contribution from Harper they could not have compelled, and their liability is lessened by the payment he has made. If the release had been intended to cover the entire cause of action embraced in the complaint, if it had been intended to accept the sum paid in full satisfaction, such would be its operation, and all who participated in the trespass would be discharged. But it was partial satisfaction, for the use and occupation, and the discharge of Harper only that was intended, and beyond that it was not available to the present defendants."[43] In Chamberlain v. Murphy,[44] the Supreme Court of Vermont say: "The defendants and their cotrespassers had incurred a liability, in its nature joint and several. The plaintiff had in fact but one cause of action, but they were at liberty to pursue it against as few or as many of the cotrespassers as they should choose. They might sue them separately or together, but very obviously they were not entitled to more than one full satisfaction. The first piece of evidence which was excluded against objection was the receipt for $65 given by the plaintiff's attorney to the estate of Simonds, one of the cotrespassers. This receipt by its terms shows that the plaintiffs' damages have been satisfied to the extent of $65, and the defendants had a right to insist upon its application to reduce the plaintiffs' recovery *pro tanto*. To hold otherwise would be to permit the plaintiffs to recover for this portion of the damage twice. If they had received this sum in full satisfaction for the injury, it would have reduced the plaintiffs' recovery to a nominal sum, but they having received it as they did, not in settlement of the cause of action, but merely agreeing to prosecute this trespasser no further, it will

[39] 3 W. Va. 393.
[40] Frink v. Green, 5 Barb. 455; DeLong v. Bailey, 9 Wend. 336; Rowely v. Stoddard, 7 Johns. 207.
[41] 24 Am. Rep. 504.
[42] 58 Ala. 600.
[43] Snow v. Chandler, 10 N. H. 62.
[44] 41 Vt. 110.

only reduce the recovery *pro tanto*."[45] In the case of Ballard v. Noaks,[46] the Supreme Court of Arkansas laid down the rule that "an accord to be a bar must be received in satisfaction." The court say: "It was then agreed between John Hill and the plaintiff in the action, that John Hill, as the agent of Sebern Hill, should have all the leather that had been put in the wagon and carried away, and that Noaks should retain all the leather in his possession in full satisfaction of the injury he had received. Accord is a satisfaction or agreement between the party injured and the party injuring, which performed, is a bar to all action on that account. For example, if the party injured accepts a sum of money or other valuable thing, that constitutes a redress of the injury, and the right of action is then entirely taken away.[47] Consent of a party to accept satisfaction, without actually receiving it, does not form a valid bar to the action. The accord must be shown to be accepted in satisfaction of the thing demanded; and although that satisfaction may have been agreed upon, still it will be no valid bar to the action, unless it be actually received and operate in full satisfaction. The satisfaction as well as the accord must be reasonable and complete."[48] The conclusion, then, we would reach from the authorities, is, that one or more joint trespassers may pay the plaintiff such sum or sums of money as they may agree upon, not as full satisfaction for the injury done, but under an agreement not to prosecute the parties so agreeing, or rather to release them from prosecution, and his cause of action will still be good against those not so agreeing. And the only benefit or advantage accruing to the defendant by virtue of such an agreement with his cotrespassers, is that it is a payment *pro tanto* of the amount for which he is responsible, and which could be recovered against him. In other words, the defendant is entitled to have the judgment against him credited with the amount paid by others, and no more. This is justice. The plaintiff gets but one recovery or satisfaction for his injury. The parties who desire so to do, may purchase their peace, and the defendant who wants a lawsuit pays the costs, and the remainder of the amount which it takes to make the plaintiff whole for the trespass committed.

2d. *After Judgment.* — After judgment is had against tort-feasers, the general rule is, that the satisfaction as to one releases all. If there are separate judgments against each of the several trespassers and the judgment against one is satisfied, it satisfies all. To these propositions there is no dissent.[49] But as to the effect of a partial payment of the judgment by one of the defendants to obtain his release, simply, is not so plain. His release, of course, amounts to his discharge, and how he can be discharged without a satisfaction as to him, either in form or f ct, is hard to see. The Supreme Court of New York, in the case of Irvine v. Millbanks,[50] held, that when a judgment was recovered against joint tort-feasors, one of them could compound and pay for his release without affecting plaintiff's rights to proceed against the others for the balance.[51] And this would seem to be the proper rule, although the cases on this point are neither numerous or satisfactory. It might be suggested, however, that there seems to be no reason why an agreement, on part payment, by the plaintiff, that he accepts the same in consideration of an agreement not to issue execution or other process against the particular defendant, will be sustained, and not release the other judgment debtors.

JNO. D. SHACKLEFORD.

Little Rock, Ark.

[45] Spencer v. Williams, 2 Vt. 209; Eastman v. Grant, 34 Vt. 387.

[46] 2 Ark. 45.

[47] 2 Chitty's Blackstone, 16; Com. Dig. title Accord; 2 Starkie's Ev. 26; Paramore v. Johnson, 1 Ld. Raym. 566, 12 Mod. 376.

[48] 5 T. R. 141; Fitch v. Sutton, 5 East, 230; Dufresne v. Hutchinson, 3 Taunt. 117; Linn v. Bruce, 2 H. B. 317; Heathcote v. Crookshakes, 2 T. R. 24; Bell v. Perry, 43 Iowa, 368; Upton v. Price, 57 Cal. 270; Knapp v. Roche, 94 N. Y. 329.

[49] Luce v. Dexter, 135 Mass. 23.

[50] 56 N. Y. 635.

[51] Knapp v. Roche, 94 N. Y. 320; Bell v. Perry, 43 Iowa, 368.

BROKERS—RIGHT TO COMMISSIONS.

WHITCOMB v. BACON.

Supreme Judicial Court of Massachusetts, March 7, 1898.

Where several brokers have each endeavored to bring about a sale which is finally consummated, and each has contributed something toward the result, that one only is entitled to a commission, in the ab-

sence of contract, whose services were the effective means, or the predominating efficient cause, of bringing about the sale.

ALLEN, J.: It has been held by us in two recent cases that a broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys it, but he must also show that his services were the efficient or effective means of bringing about the actual sale. Dowling v. Morrell, 165 Mass. 491, 43 N. E. Rep. 295; Crowninshield v. Foster, 169 Mass. 237, 47 N. E. Rep. 879. Where two or more brokers are employed, there is no implied contract to pay more than one commission, and it therefore becomes necessary to lay down a rule for determining which one of different possible claimants is entitled to be paid. A similar rule exists in the law of insurance, stated thus in 1 Phil. Ins. § 1132: "In case of the concurrence of different causes, to one of which it is necessary to attribute the loss, it is to be attributed to the efficient predominating peril, whether it is or is not in activity at the consummation of the disaster." And again, in section 1137: "If, where different parties, whether the assured and the underwriter, or different underwriters, are responsible for different causes of loss, which concur in the loss, and the damage by each cause cannot be distinguished, the party responsible for the predominating efficient cause, or that by which the operation of the other is directly occasioned, as being merely incidental to it, is liable to bear the loss." This latter rule is expressly accepted as correct in Insurance Co. v. Transportation Co., 12 Wall. 194, 199, the court saying: "When there are two concurrent causes of a loss, the predominating efficient one must be regarded as the proximate, when the damage done by each cannot be distinguished." In determining what constitutes proximate cause, the same considerations apply equally in actions of contract and of tort. New York & B. D. Exp. Co. v. Traders & M. Ins. Co., 132 Mass. 377. It may be that there are different causes which assist in producing a result, and that the result would not have happened if either one of the different causes had been wanting. A familiar example is found in cases where there has been a delay by a carrier in transporting goods, which are afterwards destroyed by flood or fire. Hoadley v. Transportation Co., 115 Mass. 304; Denny v. Railroad Co., 13 Gray, 481; Railroad Co. v. Reeves, 10 Wall. 176. So, where several brokers have each endeavored to bring about a sale which finally is consummated, it may happen that each has contributed something without which the result would not have been reached. One may have found the customer, who otherwise would not have been found, and yet the customer may refuse to conclude the bargain through his agency, and another broker may succeed where the first has failed. In such a case, in the absence of any express contract, that one only is entitled to a commission who can show that his services were the really effective means of bringing about the sale or, to use the language of Phillips, the predominating efficient cause.

The instructions of the learned judge to the jury laid special stress on the inquiry whether the sale would have been made but for the efforts of the plaintiffs. He said: "The real question is here whether you are satisfied that this sale to Wentworth would not have been made but for the efforts which the plaintiffs had made to induce him to buy it. That is the real question." And afterwards: "The real question is, and it is the crucial question, in my judgment, whether the sale would have taken place without the efforts made by the plaintiffs. If it would, then the plaintiffs have not made the sale, and they cannot recover the commission unless they have. If, however, you are satisfied this sale as made would not have taken place unless the plaintiffs had done what they did, and that what they had done was, at the time of the sale, an operating cause—not the sole cause, but one of the controlling causes, of the sale (and the burden is upon the plaintiffs to satisfy you of that)—then the plaintiffs can recover." This rule, as it seems to us, would allow two brokers to recover commissions upon the same sale. There might be another broker whose services were equally meritorious and essential in producing the result. But in such a case it is not enough to show that one of several causes stood in such a relation to the result that without it the result would not have happened, and that it was one cause, among others, which assisted or contributed in producing it. It becomes necessary to make a discrimination between the causes, and to ascertain which is the particular cause which can be called the efficient or effective one. In addition to the cases cited in Dowling v. Morrill, 165 Mass. 491, 43 N. E. Rep. 295, see Railroad Co. v. Burrows, 33 Mich. 15; Behling v. Pipe Lines, 160 Pa. St. 359, 28 Atl. Rep. 777; Romney Marsh v. Trinity House, L. R. 5 Exch. 204—discussing questions of *causa causans*, as distinguished from *causa sine qua non*. Exceptions sustained.

NOTE.—*Recent Cases on the Right of Real Estate Brokers to Commissions.*—A contract by defendant to pay plaintiff a specified commission after six months from the delivery to defendant of a deed for a one-half interest in a ranch owned by a third person is indivisible, and plaintiff cannot, upon defendant's purchase of a one-third interest in such ranch, recover a proportionate commission. Witte v. Taylor, 42 Pac. Rep. 807, 110 Cal. 224. A real estate broker who produces a customer after his principal has withdrawn his offer to sell is not entitled to a commission. Young v. Trainor (Ill. Sup.), 42 N. E. Rep. 139, 158 Ill. 428. A selling broker, who, knowing that a customer would pay the price asked, sent him to the principal to negotiate directly, without communicating his knowledge to the principal, could not recover a commission for the sale, though the principal obtained the price orig inally asked. Soule v. Deering, 32 Atl. Rep. 998, 87 Me. 365. Under a contract by the terms of which a real estate broker is to receive a commission for his services if he finds a purchaser, the broker must produce a purchaser to his principal, the owner. Baars

v. Hyland (Minn.), 67 N. W. Rep. 1148. Where a real estate agent secured a valid contract of purchase, signed by one who is able to perform it, or who is able to answer in damages, he is entitled to commissions. Chipley v. Leathe, 60 Mo. App. 15. Where a contract for procuring a sale specifies a fixed price, and in an action on the contract for commissions there is evidence that plaintiff procured a purchaser with whom defendant personally negotiated a sale for a less sum, but none to show that the purchaser was willing to pay the specified price, or why he did not pay it, a nonsuit should be directed. Childs v. Ptomey, 43 Pac. Rep. 714, 17 Mont. 502. A real estate agent who carries on the negotiations between the parties, and finally brings them together, is entitled to his commission, though the trade is eventually effected by the owner himself, or by a third person acting for him. Howe v. Warner (Colo. App.), 44 Pac. Rep. 511. In an action for commissions by a real estate broker, there was evidence that plaintiff brought the land to the attention of purchasers; that he had several interviews with the purchaser's agent, and at such agent's suggestion procured from defendant the list of tenants and rents; that there was never any definite termination of the negotiations between plaintiff and such agent; that such agent suggested, to a broker who afterwards was employed by the vendors, that, if such broker were to present the estate to the purchasers, they might buy it, saying that he was unwilling to buy through plaintiff; and that negotiations went on continuously from that time until the sale was closed. Such agent testified that he went to the second broker because he was not willing to negotiate for the property through plaintiff. Held, that plaintiff was entitled to commissions. Dowling v. Morrill, 43 N. E. Rep. 295, 165 Mass. 491. A vendor cannot escape liability for commissions to the agent employed to negotiate a sale of the land, on completing himself a sale to a purchaser with whom the agent had been negotiating, by including in the sale other lands in addition to those the agent was employed to sell. Ranson v. Weston (Mich.), 68 N. W. Rep. 152. The broker did not have the exclusive right to sell. After he had found a purchaser ready and willing to buy on the owner's terms, but before he had notified the owner thereof the owner found another purchaser, and closed a sale with him. Held, the owner was not liable to the broker for a commission. Baars v. Hyland (Mich.), 67 N. W. Rep. 1148. Where a real estate broker procured a person recognized by the owner, either expressly or tacitly, to be ready, willing, and able to purchase, and the failure to complete the sale was due solely to the owner's inability to make a good title, the agent was entitled to compensation. Davis v. Morgan (Ga.), 23 S. E. Rep. 417, 96 Ga. 518. Defendant gave to an agent an option for the sale of land on commission, and the agent found a purchaser, who entered into a land contract with defendant, whereby the premises were to be conveyed as soon as an abstract was furnished showing good title in the grantor. The abstract furnished did not show a good marketable title in defendant, and the purchaser refused to complete his contract. Held, that the agent was entitled to his commission. Stange v. Gosse (Mich.), 67 N. W. Rep. 1108. Where a broker employed to sell defendant's farm on commission produces a purchaser who takes the property at a price fixed by defendant, the latter cannot withhold the commission on the ground that when the contract of employment was made the broker had, unknown to defendant, already found the customer, and was employed by him to buy a farm, but from whom he was to receive no commission. Donohue v. Padden (Wis.), 66 N. W. Rep. 804. Plaintiff, a real estate broker, knowing defendant had property for sale, told him he had a "customer," and asked the price. At a second interview he took defendant to the house of the proposed purchaser, and introduced him, saying, "This is my customer." No sale was then made, but defendant afterwards sold to such person without plaintiff's knowledge. Held, there was no implied contract by defendant to pay plaintiff a commission. Weinhouse v. Cronin, 36 Atl. Rep. 45, 68 Conn. 250. Evidence that defendant, knowing that plaintiff was trying to make a sale of defendant's land after the expiration of plaintiff's option, wrote to him that, unless he consummated a sale of the land within a certain time, all obligations on defendant's part with him for a sale of the land would cease, and that plaintiff secured a purchaser, with whom defendant consummated a sale, sufficiently shows an agreement on defendant's part to pay plaintiff for securing the purchaser. Nolan v. Swift (Mich.), 69 N. W. Rep. 96. A real estate broker, in order to recover his commissions, must show that he secured a purchaser who was ready, able, and willing to buy. Schmidt v. Keeler, 63 Ill. App. 487. A real estate broker, employed to dispose of property, cannot claim commissions until he has furnished a purchaser willing and able to buy on the terms, and at the price, prescribed by the vendor. Stewart v. Smith (Neb.), 70 N. W. Rep. 235. Defendant agreed to pay plaintiff all over a certain sum for which plaintiff might sell certain patent rights belonging to defendant. Plaintiff negotiated a sale subject to a condition that, at the purchaser's option, exercised within a year, defendant should repurchase, so that the purchaser might get out his money, and this option was exercised. Held, that the sale was not such as to entitle plaintiff to the stipulated compensation. Pape v. Romey (Ind. App.), 45 N. E. Rep. 671. Where defendants agreed to pay plaintiffs commissions for sales of land in a certain county to customers "procured" by plaintiffs, defendants were liable for such commissions for sales made to customers procured by one employed by plaintiffs, without the knowledge of defendants, to make sales, if, before the consummation of the sales, defendants knew that the customers were furnished by plaintiffs. Boyd v. Watson (Iowa), 70 N. W. Rep. 120. A real estate agent, authorized to procure a sale at $5,300 to one who would make a cash payment of $500, is not entitled to a commission for procuring an offer of $5,600 from one who would pay only $25 down, and who required a well and a water supply, not mentioned in the terms fixed by the principal. Smith v. Allen (Iowa), 70 N. W. Rep. 694. Under an agreement by defendant to pay plaintiffs a stipulated commission only in the event they bring about a sale of defendant's land on terms satisfactory to him, plaintiffs are not entitled to the commission for merely calling the purchaser's attention to the fact the land is for sale. Greene v. Owings (Ky.), 41 S. W. Rep. 264. Real estate agents who have performed their contract with a landowner to procure a purchaser on certain terms may recover commissions, though the owner did not sell to him. Orynski v. Menger (Tex. Civ. App.), 39 S. W. Rep. 388. A real estate broker cannot recover commissions for selling land, where he fails to prove either a completed sale or one negotiated on terms authorized by the owner. Hurd v. Neilson (Iowa), 69 N. W. Rep. 867. Where defendants agree to pay commissions for customers procured for their land, plaintiffs must not only find the purchaser, but because thereof a sale must follow. Boyd v. Watson (Iowa), 70 N. W. Rep. 120. A land-

owner cannot avail himself of the services of an agent, who procured a purchaser, to effect a sale himself to such purchaser, and thereby deprive the agent of commissions; nor can he, merely to save the commissions agreed to be paid to the agent, effect such sale at a small reduction from the price at which the agent was authorized to find a purchaser, or make immaterial changes in the terms of the sale. Crook v. Forst (Ala.), 22 South. Rep. 540. An agent for the solicitation on commission of orders for the output of another's business was not entitled to compensation merely because he performed services which "tended" to obtain orders, or because he introduced to his principal parties, who subsequently gave orders. Ayres v. Thomas, 47 Pac. Rep. 1013, 116 Cal. 140. A broker who introduces a customer to his principal cannot be deprived of his commission because the principal negotiates the sale himself, and voluntarily reduces the price of the property. Hafner v. Herron, 46 N. E. Rep. 211, 165 Ill. 242. Where defendant agreed with a real estate broker to give him a commission for renting certain premises, and the broker, pursuant to said agreement, secured a contract, wherein a third person agreed to take the premises at a price satisfactory to all parties, but, by reason of misrepresentations made by defendant in regard to the duration of certain subleases, he failed to become a lessee, defendant was liable for the commission. Washburn v. Bradley (Mass.), 47 N. E. Rep. 512. Where a contract of sale of land was to be approved by the owner, an instruction that plaintiff was entitled to commission if he found the purchaser, though defendant refused to carry out the trade, was erroneous. Goin v. Hess (Iowa), 71 N. W. Rep. 218. Defendant agreed to pay plaintiff all over a certain sum for which plaintiff might sell certain patent rights owned by defendant. Plaintiff negotiated a sale, conditioned that the purchaser might, at his election, rescind the sale, and receive back the purchase price with interest. Held, that where the purchaser elected to rescind the sale without connivance of defendant, plaintiff was not entitled to any commission. Pape v. Romey (Ind. App.), 44 N. E. Rep. 654. A broker employed to sell stock forfeits his commission where, after finding a purchaser, he agrees with him and another person that the latter shall buy the stock in order that it may be obtained at a less price, and that the real purchaser shall not be disclosed to the owner. Hafner v. Herron (Ill. Sup.), 46 N. E. Rep. 211. A broker who acts adversely to his principal's interest is not entitled to his commission, whether his conduct results in injury to the principal or not. Hafner v. Herron (Ill. Sup.), 46 N. E. Rep. 211, 165 Ill. 242. A rental agent who agreed to divide his commission with the prospective lessee to induce the latter to take the premises, and, at the request of the lessee, tried to induce his principal to reduce the rental, while concealing from him his relations to the lessee, was not entitled to a commission for procuring the lessee. Hobart v. Sherburne (Minn.), 68 N. W. Rep. 841.

CORRESPONDENCE.

VALIDITY AND EFFECT OF A PARDON.

To the Editor of the Central Law Journal:

The decision of the Supreme Court of Oregon in the case of Betts, noticed in the article of Mr. Alfred E. Sears in a recent number of the CENTRAL LAW JOURNAL, seems to be supported by authority, but is it is submitted, a clear departure from principle. It ought to be the law that no acceptance, acquiescence or consent of the convict should be necessary to the validity and effect of a pardon. A pardon is an act of grace. There is nothing contractual in its nature. Unless, therefore, the convict has a vested right to be punished, it would seem that the pardon ought to be of effect without reference to the acquiescence of the convict. Can it be said that one convicted of treason or homicide has a vested right to be hung, or that one convicted of some minor felony, has a vested right to be imprisoned with or without hard labor, and maintained at the public expense for life, or for a term of years? Has the convict a vested right to, in this way, escape the burden and duty to maintain his children, and perform his share of labor upon the highways, military duty and other public burdens? The proposition appears, upon its face, absurd. It was never heard that the consent of the accused person is necessary to the entry of a *nolle* before conviction. Upon what ground can it be claimed that the absolute control of the State over its criminal process is in any manner terminated or impaired by conviction? Can it be said that a person judicially declared to have violated the law has greater rights than one who is merely accused? The true rule is that in the question whether his punishment shall be endured or remitted, the convict has no voice; and that if the public authorities are moved to remit the penalties which the law imposes, the protests or objections of the convict go for nothing.

E. G. WELLS.

Denver, Colo., April 26, 1898.

THE FOURTEENTH AMENDMENT AND WHAT IT COVERS.

To the Editor of the Central Law Journal:

In the Supreme Court of Missouri, the case of Daggs v. The Orient Insurance Co. was decided, affirming the validity of the valued policy law in very plain and unequivocal language. This case goes to the supreme court on the ground of the unconstitutionality of the law under the 14th Amendment. In view of the opinion of Justice Brown, quoted in your paper of the 29th inst. (46 Cent. L. J. 355), it might be interesting to have some of your writers construct an article as to whether the imposition of police powers by a State under that amendment would include the right to prescribe the terms and conditions under which a foreign corporation might do business within the border lines of the State. It seems to be the opinion of the appellants that the 14th Amendment has altered the *status quo* caused by the decision of Paul v. Virginia. Is the subject interesting?

St. Louis, Mo., April 30, 1898. H. A. BLOSSOM.

BOOKS RECEIVED.

Introduction to the Study of Law. By Edwin H. Woodruff, Professor of Law in Cornell University College of Law. New York, Baker, Voorhis & Company, 1898.

The Law of Negotiable Instruments, Statutes, Cases and Authorities. Edited by Ernest W. Huffcut, Professor of Law in Cornell University College of Law. New York, Baker, Voorhis & Company 1898.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

1. ADJOINING LANDOWNERS—Excavating for Cellars—Negligence.—Where one of two adjoining landowners has built a cellar wall on, and, in case of some rocks, projecting over, the line, he, on notice that the other is to excavate, is bound to shore up and protect his property, and, not having done so, cannot recover for the caving thereof, the other having used ordinary care in excavating and in breaking off the projecting rocks.—LAFP v. GUTTENKUNST, Ky., 44 S. W. Rep. 964.

2. ADMINISTRATION — Executors — Discharge.—B bequeathed to S, a certain sum for life, and after S's death "to be equally divided among her children then living, and the descendants of any who may have died:" Held that, where the executors invested the money in certain stock in the name of the life legatee, subject to the provisions of the will, in compliance with an order of court, and secured an allowance of the amount so invested in their "first and final account," the administration terminated.—SIECHRIST v. BOSE, Md., 39 Atl. Rep. 745.

3. ADMINISTRATORS — Trusts — Sales.—An administrator or guardian is prohibited from purchasing trust property at his own sale; and a sale by him to another, who does not pay any consideration, and who immediately transfers the property to the administrator or guardian, is void, and as much a violation of the fiduciary relation, and as great a fraud in the eye of the law, as if the sale had been made directly to himself.—WEBB v. BRANNER, Kan., 52 Pac. Rep. 429.

4. APPEAL — Change of School Districts.—An appeal will not lie from the order of a county superintendent changing the boundaries or school districts or creating new districts. The method of reviewing such proceedings is by petition in error.—POLLOCK v. SCHOOL DIST. NO. 42, Neb., 74 N. W. Rep. 393.

5. APPEALABLE ORDER — Injunction.—An order dissolving a temporary injunction restraining the sale of property under a chattel mortgage claimed by mortgagor to be void, under Rev. St. 1893, § 2464, by reason of a tender of payment of the debt and costs, is appealable.—SEABROOK v. MOSTOWITZ, S. Car., 29 S. E. Rep. 202.

6. ASSIGNMENT OF WAGES — Validity.—A written order for a year's wages of a workman, employed as a molder, does not apply to wages earned under a new hiring with the same employer, after having quit for two months in the said year, since at law the assignment of the benefits of the new contract was the assignment of a mere possibility, and hence inoperative.—O'KEEFE v. ALLEN, R. I., 39 Atl. Rep. 752.

7. BANKS—Liabilities—Negligence of Cashier.—A loan of money to a bank on the representations of its cashier that he would loan it out on first mortgage on good real estate, and allow 6 per cent., must be considered as done with the full knowledge of the bank, in the absence of evidence to the contrary, where the entries of all dealing concerning the money had been made both on the bank's individual ledger and in the pass book of the creditor.—DEPOSIT BANK OF CARLISLE v. FLEMING, Ky., 44 S. W. Rep. 961.

8. BANKS—Powers of Cashier—Transfer of Note.—The firm of C & C was proprietor of the Milam County Bank, and carried on the banking business in the name of the firm and as the Milam County Bank. F, one of the partners, acted as cashier, and had the power, as such, by virtue of the custom of the bank, to transfer its paper by indorsement: Held, that where a note to the Milam County Bank, on being transferred to a third person, was indorsed, "F, Cashier," such indorsement was in the usual course of business, and transferred to the holder the legal title to the note.—ARNOLD v. SWENSON, Tex., 44 S. W. Rep. 870.

9. BILLS AND NOTES—Accommodation Note—Liability of Maker.—In case a promissory note is executed without any consideration actually passing from maker to the payee, and as an accommodation to the payee, for the express purpose of enabling the latter to pledge same as collateral security for an anticipated indebtedness to a third person, in pursuance of an agreement to that effect, same in the hands of the latter can be realized upon against the maker to the extent of the secured indebtedness of the payee and pledgor, and no further.—FORSTALL v. FUSSELL, La., 23 South. Rep. 273.

10. BILLS AND NOTES — Days of Grace — Sunday.—Comp. Laws, § 4492, providing that the apparent maturity of a negotiable instrument is the next day after that which by its terms it becomes due when that is a holiday, does not make the last day of grace of a note made payable on Sunday four days after such Sunday, as the section does not apply to instruments entitled to days of grace.—MORRIS v. BAILEY, S. Dak., 74 N. W. Rep. 443.

11. BILLS AND NOTES—Indorsement—Transfer by Assignment.—A negotiable promissory note may be transferred by a separate distinct assignment thereof, but in such case the transferee will not be protected as against the infirmities or defenses which might be shown as against the assignor.—GAYLORD v. NEBRASKA SAV. & EXCH. BANK, Neb., 74 N. W. Rep. 415.

12. BILLS AND NOTES — Promissory Notes — Right to Possession.—The maker of promissory notes is not the owner nor entitled to the immediate possession thereof unless the same have been paid or canceled by a decree of court, or for other reasons have become absolutely void and invalid as obligations in the hands of the payees or of third parties; and until such payment or decree, or for other reasons, such notes have become absolutely void, an action of replevin by the maker for

the recovery of the possession thereof will not lie.—OLSON v. THOMPSON, Okla., 52 Pac. Rep. 388.

13. BOARD OF HEALTH — Powers — Nuisance.—Under the provisions of the acts of February 22, 1888, and March 29, 1892, the board of health of Asbury Park has no power to restrict the owners of a stable to the mode of laying a stable floor prescribed by an ordinance of the board. The owners have the alternative of resorting to any other method which will secure the sanitary condition of the stable, but by departing from the prescribed method they take the risk of creating a nuisance.—STATE v. BOARD OF HEALTH OF ASBURY PARK, N. J., 39 Atl. Rep. 706.

14. BUILDING AND LOAN ASSOCIATIONS—Stock—Withdrawal Value.—A member of a building association gave notice of withdrawal in May, and was informed that the association could not pay, whereupon he continued to pay his monthly dues and charges until October, when the association notified him that it was ready to pay the withdrawal value: Held, that he continued to be a member until October, and was entitled to the withdrawal value of October, and not that of May.—HAWLEY v. NORTH SIDE BUILD. & LOAN ASSN., Colo., 52 Pac. Rep. 408.

15. BUILDING ASSOCIATIONS — Payments on Stock—Lien on Homestead.—In the absence of an agreement to the effect that a stockholder in a building and loan association may have his payments on stock applied to the extinguishment of his loan debt, he has no legal right to demand that such payments shall be so applied.—PIONEER SAV. & L. CO. v. EVERHEART, Tex., 44 S. W. Rep. 885.

16. CARRIERS—Damages—Evidence.—To entitle a passenger to recover for being taken beyond her station, evidence of mental and physical suffering directly resulting from the wrong is enough. A showing of damages in dollars and cents is not required.—BELL v. GULF & C. R. CO., Miss., 23 South. Rep. 268.

17. CARRIERS—Duty to Carry Lawful Goods — Intoxicating Liquors.—A railroad company will be enjoined from refusing to carry from another State into South Carolina intoxicating liquors in original packages, consisting of bottles packed in wooden cases, when tendered in car-load lots, with a release of liability for waste or breakage not resulting from its own negligence.—BLUTHENTHAL v. SOUTHERN RY. CO., U. S. C. C., N. D. (Ga.), 84 Fed. Rep. 920.

18. CARRIERS OF PASSENGER — Unstamped Ticket.—Where ticket to H and return stipulates that, to be good for return, it must be first signed and stamped by company's, agent at H, and passenger knows of this, and signing and stamping was not done, and he did not ask that it be, he cannot complain of refusal to accept it for passage, though the agent at ticket office to whom he showed it said at the time that it was all right.—HOUSTON & T. C. RY. CO. v. AREY, Tex., 44 S. W. Rep. 894.

19. CHATTEL MORTGAGE — Record—Validity.—A mortgagee, who neglects to comply with Mills' Ann. St. ch. 25, § 887, providing that, when a chattel mortgage given to secure more than $2,500 is recorded, to be valid against third persons, there shall be recorded annually a sworn statement that the mortgage was given in good faith, and the amount due thereon, has no rights against mortgagor's execution creditors, even though they have actual notice of mortgagee's interests.—BURCHINELL v. GORSLINE, Colo., 52 Pac. Rep. 413.

20. CONSTITUTIONAL LAW — Municipal Courts — Jurisdiction.—Under Const. 1876, art. 5, § 1, declaring that the judicial power of the State shall be vested in certain specified courts, "and in such other courts as may be established by law," the legislature can neither invest municipal courts with jurisdiction exclusive of or concurrent with the State courts to try violations of the penal laws, nor invest municipal corporations with power to suspend any penal law of the State within the limits of such corporations.—COOMBS v. STATE, Tex., 44 S. W. Rep. 854.

21. CONSTITUTIONAL LAW—Tax Commissioners.—Act March 20, 1884, provides that if the local boards or officers of incorporated towns for municipalities neglect or fail to levy the taxes for certain specified purposes of local government, or there is a vacancy in the local board or office, it shall be the duty of the governor to appoint and commission three resident freeholders, who shall assess and levy such taxes for such sums as they shall deem expedient: Held, that the act, in so far as it attempts to grant authority to commissioners appointed by the governor to levy taxes, is unconstitutional, since it is the delegation of a power which the legislature may confer only on the local municipal bodies.—INHABITANTS OF TOWNSHIP OF BERNARDS, SOMERSET COUNTY, v. ALLEN, N. J., 39 Atl. Rep. 716.

22. CONTRACT—Breach—Rescission.—Defendant cannot, at the trial, without amendment, elect to rescind a contract and recover judgment thereon, when in his cross-complaint he has alleged a breach and damages therefor. When an action is based upon a rescission of the contract, the election to rescind must be clearly averred.—DETROIT HEATING & LIGHTING CO. v. STEVENS, Utah, 52 Pac. Rep. 379.

23. CONTRACT—Construction.—One agreeing to advance negotiable paper for $1,000, when needed, in buying logs, "and for any other advancement required in the purchase of logs agreed upon by the two parties to this contract," etc., is not required to furnish more than $1,000 in negotiable paper, unless he chooses to do so.—VANSANT v. RUNYON, Ky., 44 S. W. Rep. 949.

24. CONTRACT—Fraud—Rescission.—When a person ignorant of his ownership of a valuable property right sells it for an inadequate consideration, and transfers it by an instrument in which it is not specifically mentioned, and under which title to it passes only by construction of loose and general terms, and the purchaser has full knowledge of it, and of its value, and of the owner's ignorance concerning it, equity will adjudge the rescission of the contract of sale as fraudulently obtained.—THAYER v. KNOTH, Kan., 52 Pac. Rep. 433.

25. CONTRACT—Public Policy—Limitations.—The statutes of this State provide in what time actions may be brought; and a contract which provides that no action shall be brought thereon, or for a breach thereof, unless within a time therein specified, which is different from the time which the statute fixes for bringing an action on such contract or for a breach thereof, is against public policy, and will not be enforced by the courts of this State.—MILLER v. STATE INS. CO. OF DES MOINES, IOWA, Neb., 74 N. W. Rep. 416.

26. CONTRACT—Res Judicata.—A recovery on a contract for boarding does not bar a suit on a separate contract for nursing and washing done for defendant while she was boarded.—SCHUSTER v. WHITE'S ADMR., Ky., 44 S. W. Rep. 959.

27. CORPORATIONS—Officers and Agents.—The employment of counsel to give advice as to a debt owing by a corporation was within the scope of the authority granted its president and general manager by the by-laws, which gave the president direction of the affairs of the corporation, subject to the advice of the directors, and made it the general manager's duty to take charge of and control all the company's business, and authorized him "to contract debts for the necessary operation of the business," without the order of the board of directors.—DALLAS ICE FACTORY & COLD STORAGE CO. v. CRAWFORD, Tex., 44 S. W. Rep. 875.

28. COURTS—Disqualification of Judge.—A judge who presided at the trial of an action, and rendered judgment therein, is not, from that fact, disqualified, by section 87, ch. 19, Comp. St., to hear another suit, brought to vacate the judgment in the former one.—CHICAGO, B. & Q. R. CO. v. KELLOGG, Neb., 74 N. W. Rep. 403.

29. CRIMINAL EVIDENCE—Homicide—Dying Declarations.—Where a deceased person, at the time of his being wounded, stated to a witness that he could not live much longer, and that he was bound to die, decla ra

tions made under such circumstances are admissible in favor of an accused as a dying declaration.—STATE V. ASHWORTH, La., 23 South. Rep. 270.

30. CRIMINAL EVIDENCE — Theft — Character.—Witnesses who have testified to the good character of defendant, charged with theft of cattle, cannot be asked if they had not heard him accused of theft of other cattle, though said theft occurred prior to that for which he was being tried, where they had not heard of such charge till after the theft at issue.—HOPPERWOOD V. STATE, Tex., 44 S. W. Rep. 841.

31. CRIMINAL LAW—Assault—Evidence.—A conviction of an aggravated assault was fully sustained, where it appeared that defendant fired a pistol at the prosecutor, while he was engaged in nailing up a gate to a field belonging to him, in order to prevent defendant from making use thereof.—ESTES V. STATE, Tex., 44 S. W. Rep. 838.

32. CRIMINAL LAW—Homicide—Killing Trespasser.—The owner of a dwelling house may resist a trespass therein by force, but has no right to kill the trespasser unless necessary to prevent the commission of a felony on his person or property.—STATE V. TAYLOR, Mo., 44 S. W. Rep. 785.

33. CRIMINAL LAW—Homicide—Principal and Accessory.—On trial for aiding in a murder, an instruction that, if the principal was guilty of murder, and defendant was present at the time and place of the shooting, and willfully, maliciously, feloniously, with malice aforethought, and not in his necessary or apparently necessary self-defense, advised the principal to do the shooting, or in any way aided the principal therein, he was guilty of murder, did not make defendant's guilt dependent wholly on the guilt of the principal.—BASKETT V. COMMONWEALTH, Ky., 44 S. W. Rep. 970.

34. CRIMINAL LAW—Homicide—Self-defense.—Where it appeared that deceased had threatened the life of the accused, a charge that if the accused, "not being armed for the difficulty," was assailed by deceased shooting him, and the accused returned the fire, killing his assailant, such killing was justifiable, is erroneous, as making the right of the accused to kill in self-defense dependent on his being armed.—SMITH V. STATE, Miss., 23 South. Rep. 260.

35. CRIMINAL LAW—New Trial.—Evidence that the prosecuting witness bet a suit of clothes that defendant would be convicted is no ground for a new trial.—REED V. STATE, Tex., 44 S. W. Rep. 833.

36. DAMAGES—Loss of Time.—The loss of time of plaintiff's employees, paid by him under contract, is not an item of "actual damages" sustained by reason of injury to property through a defect in a bridge, within Rev. St. § 1169.—PEARSON V. SPARTANBURG COUNTY, S. Car., 29 S. E. Rep. 193.

37. DEDICATION.—A common-law dedication, which can be established only by convincing evidence of intention of the donor to appropriate the land to public use and proof of acceptance by the public, is not shown by the fact that when a county building was constructed, the four feet of the lot nearest the street were not built on, but were paved as other parts of the sidewalk.—BAKER V. SQUIER, Mo., 44 S. W. Rep. 792.

38. DEEDS—Covenants in Restraint of Trade.—An agreement by the vendor not to allow the sale of intoxicating liquors in any building owned by him or afterwards conveyed, in the same block, for a period of five years, is not such a restraint of trade as is against public policy.—ANDERSON V. ROWLAND, Tex., 44 S. W. Rep. 911.

39. DEEDS OF TRUST—Substitution of Trustee.—A provision in a deed of trust authorizing the *cestui que trust* "and his assigns" to appoint a substitute trustee, in case the trustee named fails to act, means that both he and his assigns have such power, severally and in succession, and does not require them to join in such act.—MILLER V. KNOWLES, Tex., 44 S. W. Rep. 927.

40. EASEMENT CONSTRUED—Railroad Right of Way.—At the time a grant of a right to store and flood water for mining purposes upon any of the land of a certain described tract was made, an easement to convey water from certain courses to such land existed within the purview of the parties thereto: Held, that the grant so made excluded from the easement granted any right to lay pipes to conduct water across the tract except such as existed at or about the time the grant was made.—MONTANA ORE PURCHASING CO. V. BOSTON & M. CONSOL. COPPER & SILVER MIN. CO., Mont., 32 Pac. Rep. 375.

41. EVIDENCE—Impeachment.—Where, in a prosecution for giving away whisky on election day, a witness for the State testifies that he had not seen accused give away any liquor, and then the State shows that he had sworn differently on other occasions, accused may show that the witness had made statements, shortly after the alleged transaction, in accord with his testimony.—KEITH V. STATE, Tex., 44 S. W. Rep. 849.

42. EVIDENCE—Parol Evidence—Conversion of Notes.—A subscriber to stock of a corporation may show by parol that the subscription was obtained by fraudulent representations and promises not intended to be fulfilled.—TURNER V. GROBE, Tex., 44 S. W. Rep. 898.

43. EVIDENCE—Parol Evidence — Vendors' Liens.—Where the agreement for a conveyance and the deed conveying the property merely show a sale subject to an existing lien, parol evidence is inadmissible, in the absence of fraud or mistake, to show that the grantees agreed to pay the debt represented by the lien.—MAXWELL V. CHAMBERLIN, Miss., 23 South. Rep. 266.

44. EXECUTION—Collateral Attack.—A purchaser at execution sale having notice of an unrecorded deed before the levy was made takes subject to the deed.—HOLT V. HUNT, Tex., 44 S. W. Rep. 889.

45. EXECUTION SALE—Setting Aside.—Under Rev. St. 1889, § 4895, providing that the party in whose favor a judgment is rendered may have execution thereon, such party is not bound by proceedings under an execution issued by the clerk without authority from the party or his attorney, though it is the clerk's custom to thus issue executions on judgments rendered at the preceding term.—DAVIS V. MCCANN, Mo., 44 S. W. Rep. 795.

46. FEDERAL COURTS — Jurisdiction—Constitutional Questions.—A plea in abatement on the ground that the parties were "improperly or collusively" joined for the purpose of making a case cognizable in the federal courts, in the meaning of Act March 3, 1875, § 3, raises no issue involving the construction or application of the constitution, so as to make the case appealable directly from the circuit court to the supreme court, under Act March 3, 1891, § 5.—MERRITT V. PRESIDENT, ETC., OF BOWDOIN COLLEGE, U. S. S. C., 18 S. C. Rep. 415.

47. FRAUDS, STATUTE OF—Sales.—Where the buyer agreed to pay for the goods on their delivery, and the goods were shipped to the place of the buyer's residence on the seller's order, and the buyer refused to pay a draft for the price, there was no such delivery as would take the case out of the statute of frauds, the contract being oral, and the value of the goods being in excess of 10*l*.—FT. WORTH PACKING CO. V. CONSUMERS' MEAT CO., Md., 39 Atl. Rep. 746.

48. FRAUDULENT CONVEYANCE.—One who had disposed of all his real estate, chattels and live stock, and owned no property liable to execution, after process was served upon him, without any consideration except love and affection, assigned to his son a $300 check paid to him for his interest in some real estate: Held, that as against an antecedent creditor, the transfer was fraudulent and without sufficient consideration.—FRANKLIN V. COOPER, Ky., 44 S. W. Rep. 976.

49. FRAUDULENT CONVEYANCES.—A sale, though fraudulent and void as to creditors, is binding on the parties to it.—LILIENTHAL V. DRUCKLIEB, U. S. C. C., S. D. (N. Y.), 84 Fed. Rep. 918.

50. FRAUDULENT CONVEYANCES—Consideration—Husband and Wife.—As against the husband's creditors,

whose rights accrued prior to a transfer of real property by the husband to the wife in payment of an alleged debt, the burden is on the wife to establish that she was a *bona fide* creditor of the husband.—STOCKSLAGER v. MECHANICS' LOAN & SAVINGS INSTITUTE, Md., 39 Atl. Rep. 742.

51. FRAUDULENT CONVEYANCES—Deed by Indorser.—Though a voluntary conveyance by one of all his property to the wife of his son, when contingently liable as indorser of the notes of his son, was not conclusive proof that such conveyance was made to defraud the holder of such notes, as such holder was not an existing creditor of such grantor, the fact of such contingent liability should be considered, with other facts, as tending to show actual fraud.—LONG BRANCH BANKING CO. v. DENNIS, N. J., 39 Atl. Rep. 689.

52. GARNISHMENT—Collateral Attack.—An attachment was begun against a prisoner at large on bail, and the surety on the bail bond was summoned as garnishee. It appeared that defendant had deposited money with the garnishee, indemnifying him against liability as his surety. The garnishee had not been released from liability on the bond, but plaintiff contended that the bond, by reason of certain irregularities, was a nullity: Held, that the garnishee was not liable.—HOLKER v. HENNESSY, Mo., 44 S. W. Rep. 794.

53. GARNISHMENT — Intermeddlers — Parties.—After one has instituted proceedings in garnishment, and obtained a judgment against the debtor, he has the right in such proceedings, where the garnishee does not object, to sue one who had taken defendant's property from the garnishee's possession by an attachment in a suit against the original debtor.—BELL v. STEWART, Tex., 44 S. W. Rep. 925.

54. GARNISHMENT—Payment of Claim.—Suit having been commenced against several non-resident defendants by attachment, and the garnishment of resident commission merchants as stakeholders, a judgment pronounced against them upon traverse of their answers will be reversed if the evidence substantially shows that they have paid and satisfied the plaintiff's demand.—TRIBETTE v. GWIN, La., 23 South. Rep. 285.

55. GARNISHMENT—Salary of Employee.—There was evidence that defendant drew his salary promptly when, and sometimes before, it was due, and with great regularity; and that the small sum due him when the writ was served was not intended by him to be left as a deposit, but was not drawn because he did not know the state of his account: Held, that the exemption had not terminated, since it was not left with his employers knowingly or voluntarily.—CHILDRESS v. FRANKS, Tex., 44 S. W. Rep. 868.

56. GIFT—Acceptance.—Where a father executes a deed for valuable lands to his daughter as a gift, and delivers it unconditionally to his son for her, her acceptance of the deed will be presumed, and it will ordinarily take effect from the time of the delivery to the son.—JONES v. KERR, Kan., 52 Pac. Rep. 429.

57. HOMESTEAD — Cancellation of Entry.—A homestead settler, who makes improvements upon a tract of government land, and whose entry is afterwards canceled, may remove the same after the land has been awarded to an adverse settler.—WINANS v. BEIDLER, Okla., 52 Pac. Rep. 405.

58. HOMESTEAD—Mortgage—Abandonment.—A mortgage given on a homestead is void although the mortgagors had formed the intention and were making preparations to abandon it.—CAYWOOD v. HENDERSON, Tex., 44 S. W. Rep. 927.

59. HUSBAND AND WIFE—Antenuptial Contract—Construction.—H and W, contemplating marriage, entered into an antenuptial contract, by the terms of which it was agreed that an 80-acre farm and the accumulations thereof, on the death of both of the parties to the contract, should be divided in equal shares among the five sons of W by a former husband and whatever children should be born to the parties to the contract: Held, that the word "accumulations" does not include lands subsequently purchased and deeded to H, whether paid for from the products of the land mentioned in the contract or not; that the word "accumulations," as used in this connection, included only improvements and betterments on the land itself, and whatever would pass with the original tract as a betterment or accretion.—HAENKY v. WEISHAAR, Kan., 52 Pac. Rep. 487.

60. INJUNCTION—Adequate Remedy at Law.—Where adverse claimants are residing upon a tract of land, and each claiming the same as a homestead by virtue of priority of settlement, and the land department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary, when he has already resided upon the land a sufficient length of time, under the law, to enable him to make final proof for the land.—BLACK v. JACKSON, Okla., 52 Pac. Rep. 406.

61. INSURANCE COMPANY — Foreign Insurance Companies—Licenses.—Under Rev. St. § 1955, requiring the insurance commissioner to revoke the license of a foreign insurance company to do business for failing to comply with the laws applicable to it, he may revoke a current license where fees for licenses granted for previous years have not been paid.—TRAVELERS' INS. CO. OF HARTFORD, CONN., v. FRICKE, Wis., 74 N. W. Rep. 372.

62. INTOXICATING LIQUORS — Illegal Sale.—Where defendant sent to a brewery outside the county an order for beer, to be delivered to him and kept for the purchaser until called for, there was no sale by defendant within the county, so that a charge to the jury to find him guilty if they believed he was agent of the brewery was misleading.—NEWBURY v. STATE, Tex., 44 S. W. Rep. 843.

63. INTOXICATING LIQUOR—Illegal Sale.—In an action for illegal sale of liquor, defendant claimed the same was neither malt nor alcoholic. A building contractor testified he had drank malt liquors; that he had drank a great deal of the liquor in question; that he knew of the manufacture of malt liquors; and that from this experience, and from drinking the liquor sold by defendant, it was neither malt nor alcoholic: Held, that the testimony was properly excluded.—STEIN v. ADAMS, Miss., 23 South. Rep. 269.

64. INTOXICATING LIQUORS — Jeopardy—Sales.—On a trial for the sale of intoxicating liquor, where the State showed three distinct sales constituting separate offenses, and defendant pleaded former jeopardy, but offered no evidence that he had been convicted of the sale charged, the admission of statements of jurors who tried defendant in a former case, wherein there was a conviction, that they did not convict him for the sale charged in the second indictment, was harmless error.—BRUCE v. STATE, Tex., 44 S. W. Rep. 852.

65. JUDGMENT—Attack—Res Judicata.—Though the record in which a judgment is pronounced discloses upon its face that the court had jurisdiction both of the subject-matter of the suit and of the parties thereto, still, a party made liable by such a judgment, who has never appeared in the action, and who was never given legal notice of the pendency of such action, may, in a proper proceeding, either as a cause of action or defense, show that the recitals of the record that he was served with the process of the court are false.—EAYRS v. NASON, Neb., 74 N. W. Rep. 408.

66. JUDGMENT — Vacation.—A party who seeks the vacation of a judgment after the term at which it was rendered must allege and prove that he has a valid cause of action or defense, and, to entitle him to relief, the court must adjudge that such cause of action or defense is *prima facie* valid.—GILBERT v. MARROW, Neb., 74 N. W. Rep. 420.

67. JUDGMENT AS EVIDENCE—Wrongful Levy.—A judgment in an action between T and S, enjoining S from renting or attempting to collect rent of premises, or in any way interfering with the premises or tenants, is

admissible in an action between T and a tenant, involving the right to rent, in which the tenant relies on payment to S, though knowing at the time thereof of the judgment.—THOMAS v. JUDY, Tex., 44 S. W. Rep. 890.

68. LANDLORD AND TENANT—Lease of School Lands.—The governor, secretary, and auditor of Oklahoma, as the board for leasing the school, college, and public building lands of said territory, are not authorized, under the acts of congress and the rules prescribed by the secretary of the interior, to lease any of said lands for a longer period than three years, and, consequently, cannot accept an application to lease a portion of such lands for a period of five years, and thereby compel the persons making such application to comply with the terms and conditions thereof.—RENFROW v. GRIMES, Okla., 52 Pac. Rep. 389.

69. LANDLORD AND TENANT — Lien on Crops.—A landlord who lends his tenant money, and becomes his security for supplies furnished him by another to enable him to make a crop on the rented premises, has no lien on said crop, as against other creditors of the tenant, for the money lent, or paid as such surety, although it was otherwise agreed between landlord and tenant.—KELLEY v. KING, Tex., 44 S. W. Rep. 915.

70. LANDLORD AND TENANT—When Relation Exists.—By a written agreement, the defendants "leased, demised, and to farm let" unto the plaintiff a farm in this State for a term of five years, from April 1, 1893. The plaintiff agreed to cultivate the farm according to the rules of good husbandry, that he would not underlet, and that he would give to the defendants one-half of the products of the farm. The dwelling house in the occupancy of a third person was excepted from the lease: Held, that this agreement created the relation of landlord and tenant between the parties to this suit.—STATE v. WARNER, N. J., 39 Atl. Rep. 697.

71. LIFE INSURANCE—Conditions — Premium.—Stipulations in a contract of life insurance providing for a forfeiture in case of default by the insured in paying premiums at a place and on a day specified are inserted for the benefit of the company, and may be waived by it.—HARTFORD LIFE & ANNUITY INS. CO. v. EASTMAN, Neb., 74 N. W. Rep. 394.

72. LIMITATION OF ACTIONS — Covenants against Incumbrance.—Limitation does not begin to run against the right of action of grantees in a deed, on the implied covenant of warranty against incumbrances, until the land is sold under the judgment which enforces the incumbrance.—SIEBERT v. BERGMAN, Tex., 44 S. W. Rep. 872.

73. LIMITATION OF ACTIONS — Part Payment.—Under Comp. St. Div. 1, §§ 53, 54, providing that, in case a payment on a debt is made after maturity, the statutory limitation shall commence from the time of such payment, a payment by a joint maker of a note after its maturity, without the assent of the co-maker, does not extend the period of limitation as to the latter.—OLESON v. WILSON, Mont., 52 Pac. Rep. 372.

74. MALICIOUS PROSECUTION — Justification.—If defendant, in an action for malicious prosecution, laid all the facts upon which he based his prosecution before a competent attorney, and fairly obtained his advice that such prosecution was legal, and he acted in good faith upon it, it is a defense to the action.—MESKER v. MCCOURT, Ky., 44 S. W. Rep. 975.

75. MANDAMUS.—For the disallowance of a claim against the State by the auditor, the law furnishes an adequate remedy by appeal. *Mandamus* will not issue to compel the auditor to issue a warrant for a claim which he was disallowed, and this whether the reasons given by him for its disallowance be good or bad.—STATE v. CORNELL, Neb., 74 N. W. Rep. 398.

76. MANDAMUS — Issues Triable.—In an application for a writ of *mandamus*, the court will not try the title or right of possession to real or personal property, and, by allowing the writ, make it subserve the purpose of a writ of ejectment or replevin.—JONES v. WILLIAMS, Neb., 74 N. W. Rep. 397.

77. MANDAMUS—When Lies — Loans.—Where the dispute is one of law merely, *mandamus* is the proper remedy to compel the lower court to dissolve an injunction.—THOMAS v. ADSIT, Mich., 74 N. W. Rep. 381.

78. MARITIME LIENS — Wharfage.—Persons who furnish wharfage and services in discharging, on the order of a broker, who merely states that he is the ship's agent, are placed upon inquiry as to the source of his authority, and are chargeable with notice that he was acting for the charterers, who were required by the terms of the charter party to pay these charges.—THE BURTON, U. S. D. C., D. (Mass.), 84 Fed. Rep. 998.

79. MASTER AND SERVANT—Negligence—Incompetent Co-employee.—An employer is liable for an injury resulting from the employment of an incompetent co-employee, though he had once been competent, and his incompetency was due to lack of practice.—CURRAN v. A. H. STANGE CO., Wis., 74 N. W. Rep. 377.

80. MASTER AND SERVANT—Railroads—Assault by Conductor.—Where it plainly appeared from the evidence, in an action against a railway company for damages for an assault on a passenger by the conductor of defendant's train, that he used more force than was necessary to repel an assault on him by plaintiff, it was not prejudicial to leave to the jury to decide whether or not such conductor used more force than was necessary to protect himself in repelling such assault on him.—ST. LOUIS S. W. RY. CO. v. BERGER, Ark., 44 S. W. Rep. 809.

81. MORTGAGES—Delivery.—It cannot be inferred that a mortgage, although left in the custody of the mortgagee, was delivered as to one of two joint mortgagors upon the signing and acknowledgment by him, when it was the manifest intention of the parties that it should not take effect until execution by the other mortgagor.—HOAGLAND v. GREEN, Neb., 74 N. W. Rep. 424.

82. MORTGAGES—Foreclosure—Bond.—A condition in a mortgage bond, which provided that the obligors were to pay the obligee the proceeds of all sales of lands conveyed to the obligors, was not broken by a conveyance made by the obligors, not as an actual sale, but without consideration, and merely for the purpose of making the grantee a depositary of the title.—FOWLER v. TOVELL, N. J., 39 Atl. Rep. 725.

83. MORTGAGE—Foreclosure Sale — Defective Return.—A return of a sheriff on an order for the sale of land, which fails to show that notice of the sale for the time and in the manner required by law was duly given, is irregular; and the irregularity is not entirely cured by an accompanying affidavit of the printer showing the essential facts omitted from the return. Where the sale was made at a wholly inadequate price, it is error to confirm it on such a defective return.—EVANS v. BUSHNELL, Kan., 52 Pac. Rep. 419.

84. MORTGAGES—Release — Bona Fide Assignee.—The mortgagee released a part of the mortgaged premises with notice of a subsequent mortgage upon the unreleased portion, but with an agreement with its holder that the first mortgage should be the first lien upon such unreleased part: Held, that the agreement created a latent equity in favor of a third party, and that a subsequent *bona fide* assignee of the second mortgage held it free from this equity.—DE WITT v. KANIPER, N. J., 39 Atl. Rep. 698.

85. MORTGAGES—Right of Possession.—A grantee in a deed absolute, intended as a mortgage, is not within the exception of Comp. Laws, § 4358, providing that "a mortgage does not entitle the mortgagee to the possession of the property, unless authorized by the express terms of the mortgage."—YANKTON BUILD. & LOAN ASSN. v. DOWLING, S. Dak., 74 N. W. Rep. 436.

86. MORTGAGES — Trusts — Limitations.—One of two purchasers of land, taking the deed in his own name, and agreeing to hold it for the other, having possession, until repaid what he had advanced on the price, is a mortgagee, and not a trustee; and limitations will run against his claim.—RATLIFF v. GROOM, Ky., 44 S. W. Rep. 968.

87. MUNICIPAL CORPORATION — Constitutional Law—Special Assessments.—A statute authorizing municipal authorities to drain, fill, or grade lots or pieces of ground within the corporate limits, "so as to prevent stagnant water, banks of earth, or other nuisances accumulating or existing thereon," and providing for the assessment of the entire expense of the improvement against the property so drained, filled, or graded, is not in violation of the provision of the constitution relating to special taxation for local improvements. The enactment of such a law is a warranted exercise of the police power of the State.—HORBACH v. CITY OF OMAHA, Neb., 74 N. W. Rep. 434.

88. MUNICIPAL CORPORATION — Dedication.—When lands have been dedicated to public uses, the municipal corporation within which they lie, as the representative of the public in which the right of possession inheres, may maintain an action of ejectment therefor. —WEGER v. INHAB. OF TOWNSHIP OF DELRAN, N. J., 39 Atl. Rep. 730.

89. MUNICIPAL CORPORATIONS — Powers.—The common council of Dover is without power to grant leave to a corporation organized under the general law of this State, entitled "An act concerning corporations," to lay gas pipes and operate a gas plant in Dover.—STATE v. MAYOR, ETC., OF DOVER, N. J., 39 Atl. Rep. 705.

90. MUNICIPAL CORPORATIONS—Voluntary Payment—Recovery.—Where a town board allows an illegal claim against the town, having no authority to pass on its validity, the act is void; and the voluntary character of the payment is no defense to a suit by the town to recover the money which has been thus illegally paid. —WARD v. TOWN OF BARNUM, Colo., 52 Pac. Rep. 412.

91. NEGLIGENCE—Personal Injuries.—A boy of 17 1-2 years, who, out of curiosity, goes upon the premises of a railroad company to witness the accidental burning of a train of tank cars, filled with petroleum, assumes the risks of the situation; and, though he voluntarily renders some services in preventing the spread of the fire to other property, he cannot recover against the company for injuries caused by an explosion of one of the cars.—CLEVELAND, ETC. RY. CO. v. BALLENTINE, U. S. C. C. of App., Seventh Circuit, 84 Fed. Rep. 935.

92. OFFICE AND OFFICERS — County Treasurer—Compensation.—A salaried county officer, for the performance of the duties of his official position, and service which he performs voluntarily as such officer, by request of the governing body of the corporation, is entitled to his salary only.—QUAW v. PAFF, Wis., 74 N. W. Rep. 869.

93. PLEADING — Damages.—A recovery may be had, under a general allegation of damages, for all injuries which necessarily follow as results of the act the subject of complaint. They need not be specially pleaded, and this is applicable to necessarily resulting permanent effects of the injuries.—CITY OF HARVARD v. STILES, Neb., 74 N. W. Rep. 399.

94. PLEADING—Ejectment — Inconsistent Defenses.—In ejectment, after foreclosure by the purchaser at the foreclosure sale, a defense setting up that there had been a valid extension of the time of payment of the note which had not yet expired, of which plaintiff had notice before the sale, is not inconsistent with a general denial contained in the same answer.—FISHER v. STEVENS, Mo., 44 S. W. Rep. 769.

95. PLEDGES—Transfer by Pledgor.—A swindler borrowed money from plaintiff, and gave defective diamonds as security. After his arrest, plaintiff delivered the stones to a detective, to be used in evidence. The swindler then agreed with defendant, from whom he had also fraudulently procured a loan, that the stones should be delivered to her, to apply on a note which he had given her: Held, that plaintiff had a prior lien on such stones.—SCHOYER v. LEIF, Colo., 52 Pac. Rep. 416.

96. PRINCIPAL AND AGENT—General Agent — Authority.—A milling company, which gives an agent authority to sell its flour to all persons wishing to buy within certain territory, constitutes him its general agent for that purpose.—POTTER v. SPRINGFIELD MILLING CO. Miss., 23 South. Rep. 259.

97. RAILROAD COMPANY — Crossing Accidents — Contributory Negligence.—The duty to look and to listen before crossing a railroad includes the duty to do that which will make looking and listening reasonably effective. If there is a permanent obstruction to sight that would make danger invisible, and a transient noise that would make it inaudible, it is negligence to go forward at once from a place of safety to a place of possible danger. Prudence requires delay until the transient noise has abated, and hearing again become efficient for protection.—CENTRAL R. CO. OF NEW JERSEY v. SMALLEY, N. J., 39 Atl. Rep. 695.

98. RAILROAD COMPANY — Fires Set by Locomotives—Evidence.—To authorize a plaintiff to recover damages from a railroad company for the destruction of property by fire caused by the running of its locomotive, it must appear that such damage was occasioned by the fault or negligence of the company or its agents. If, without more, it should be shown that the fire was occasioned by operation of the locomotive, negligence on the part of the company would be presumed.—GAINESVILLE, J. & S. R. CO. v. EDMONDSON, Ga., 29 S. E. Rep. 213.

99. RAILROAD COMPANY—Rules for Running Trains.—Rules adopted by railroad companies for the management of trains are presumably selected as the best for avoiding accidents, and, unless clearly shown to be palpably unreasonable or insufficient, the company should not be charged with negligence on account of their adoption and use.—LITTLE ROCK & M. R. CO. v. BARRY, U. S. C. C. of App., Eighth Circuit, 84 Fed. Rep. 944.

100. REAL ESTATE BROKERS — Performance.—A contract by a broker to find a purchaser for land is not performed, so as to entitle him to a commission, where he procured one who merely obtained an option on the land, and made no offer to purchase.—BRACKENRIDGE v. CLARIDGE, Tex., 44 S. W. Rep. 819.

101. RECEIVER AS PARTY.—A receiver of a corporation, appointed by the federal court, is not a necessary party to the suit in the State court brought against the corporation by a city to annul an ordinance and rescind a contract granting it the right to maintain and operate waterworks.—PALESTINE WATER & POWER CO. v. CITY OF PALESTINE, Tex., 44 S. W. Rep. 814.

102. SALE—Acceptance — Effect.—Where the vendees of machines intended or adapted for pulverizing stone and hard materials, and purchased under a warranty of fitness for such purpose, after testing them, and, discovering defects which cause dissatisfaction, continue to use them, not in order to make further tests, but merely for the purpose of their own convenience or profit, such use constitutes an acceptance, and concludes them from the defense of a total failure of consideration, and they must rely upon their warranty.—WOODWARD v. EMMONS, N. J., 39 Atl. Rep. 793.

103. SALES—Breach of Warranty — Notice.—Where a warranty provided that the buyer should give notice to the seller of any defects found in the machine sold which might constitute a breach of such warranty, complaints not made until two years afterwards were not made within a reasonable time, when, in the meantime, the buyer had frequently seen the resident agent of the seller, and obtained an extension of his purchase notes.—RUSSELL & CO. v. NEWDIGATE, Ky., 44 S. W. Rep. 973.

104. SALE—Rescission by Purchaser.—If a contract of sale is entire and indivisible, though it may include the delivery to the purchaser of two or more distinct articles at different dates, a failure as to any one on the part of the seller may afford ground for rescission by the purchaser.—MCCORMICK HARVESTING MACH. CO. v. COURTRIGHT, Neb., 74 N. W. Rep. 418.

105. SEDUCTION—Alienations of Affections—Damages. —In an action for alienating the wife's affections, the husband may recover the value of her services, the loss

of her society, affections, and assistance, less the value of the performance of the husband's duty to support, clothe, and care for her.—PRETTYMAN v. WILLIAMSON, Del., 39 Atl. Rep. 781.

106. SLANDER — Charge of Intoxication. — Words charging intoxication to such a degree as to amount to a violation of decency, not being an offense at common law or by statute, but only by ordinance of the town, are not actionable *per se*.—LODGE v. O'TOOLE, R. I., 39 Atl. Rep. 752.

107. SPECIFIC PERFORMANCE—Sale of Real Estate—Extension of Option.—Where one who holds an option under a contract for the purchase of lands has refused to purchase them upon the agreed terms, the court cannot, in his suit for specific performance, extend the agreed time within which he was to elect whether or not to exercise the option.—POPE v. HOOPES, U. S. C. C., D. (N. J.), 84 Fed. Rep. 927.

108. STATUTES—Construction.—A duty can be said to be imposed by implication of law only where it is clearly apparent that the legislature, in enacting the sections from which it is claimed the implication arises, meant to impose the duty. It is not enough that the legislature may have meant what it is claimed arises by implication, but, in order that a duty may be so imposed, it must appear from necessity, where the legislature has used no language directly referring to the obligation in question.—BOARD OF COMMRS. OF LOGAN COUNTY v. HARVEY, Okla., 52 Pac. Rep. 402.

109. TENANCY IN COMMON—Adjustment of Equities.—In a suit for partition, the power of the court to adjust the equities of the parties, including the allowance of rent to the excluded tenant, where the premises have been held adversely to him by the other tenant, is not impaired by How. Ann. St. § 5778, limiting recovery against a co-tenant to moneys actually received by the tenant in possession, in excess of his just proportion of the rents and profits.—FENTON v. WENDELL, Mich., 74 N. W. Rep. 384.

110. TRESPASS TO TRY TITLE—Recovery for Breach of Contract.—Where defendant in trespass to try title sets up rights under a contract entered into with plaintiff, whereby defendant was to obtain a deed of the land and as a part of the consideration agreed to build a switch for plaintiff, plaintiff may plead and recover damages resulting from the failure to build the switch.—SAN ANTONIO & A. P. RY. CO. v. GURLEY, Tex., 44 S. W. Rep. 865.

111. TRIAL—Instructions.—Under Const. 1895, art. 5, § 26, providing that judges shall not charge in respect to matters of fact, an instruction, in an action for damages caused by negligence, that, "if the city placed obstructions there, not giving any notice, and he (plaintiff) sustained damages, it would be an act of negligence" is erroneous.—CHINA v. CITY OF SUMTER, S. Car., 29 S. E. Rep. 206.

112. TRUST DEED—Parties—Liability for Loss of Property Insured.—Where plaintiff gives another a trust deed of his farm as security for a note to a third person, and before the maturity thereof, sues a railroad for damages for burning a barn on the farm, and the note was paid by a sale of the premises, before judgment was rendered, the plaintiff was the real party in interest, and the proper party to maintain the action.—MATTHEWS v. MISSOURI PAC. RY. CO., Mo., 44 S. W. Rep. 802.

113. TRUST DEED—Sale in Unauthorized County.—When a trust deed gives the trustee therein named power to sell the lands conveyed, the sale to be had in a certain county, and the trustee sells in a different county, the sale is null and void.—CHANDLER v. PETERS, Tex., 44 S. W. Rep. 867.

114. TRUSTS AND TRUSTEES—Following Trust Funds.—To render an assignee liable to account to a party who had placed money in the hands of his assignor as a trust fund, it must appear either that the fund actually passed into the hands of the assignee, or that property into which it can be traced passed to his hands, or, if so commingled with the general assets of the assignor as to be incapable of identification or tracing, that the estate which did pass to the assignee was augmented or bettered thereby; and the use of the trust money by the assignor in the payment of his debts, and to defray the current expenses of his business, cannot be held an augmentation or betterment of his estate, when all the assets passing to the assignee existed as the property of the assignor prior to the receipt of the trust money by him.—TRAVELERS' INS. CO. v. CALDWELL, Kan., 52 Pac. Rep. 440.

115. VENDOR'S LIEN — Improvements—Fixtures.—A sawmill erected by vendee upon the realty purchased, intended by him as a permanent annexation to the soil, becomes subject to a vendor's lien for the purchase money of the land.—MARKLE v. STACKHOUSE, Ark., 44 S. W. Rep. 808.

116. WATERS — Irrigation — Taxation.—The use of water for the purpose of irrigation of arid lands is a public use within the import of the constitution; and that this is true, coupled with the further facts that each person within the range of the operation of an irrigation ditch or canal could, by payment of the customary rates, command the services of the company owning the ditch, and thereby obtain the use of water, and that the nature of the business was such as to make it subject to legislative control, warranted the legislature in designating such ditches or canals works of internal improvement.—CUMMINGS v. HYATT, Neb., 74 N. W. Rep. 411.

117. WILLS—Construction—Lapse of Legacies.—A will provided that a legacy should go to the legatee if she survived testatrix, and, if not, it was to go into the residue of the estate. A codicil provided that the legacy should go to the legatee, "and her executors and administrators, absolutely:" Held, that the legacy passed, on the death of the legatee before testatrix, to the legatee's executor or administrator.—KERRIGAN v. TABB, N. J., 39 Atl. Rep. 701.

118. WILLS—Construction—Power to Mortgage.—The terms of a will authorizing the executor, within a certain time, to sell or dispose of any portion of the devised real estate, and reinvest the proceeds, confer no power to mortgage, or to convey after the expiration of the time limit in satisfaction of a mortgage previously given.—ALLEN v. RUDDELL, S. Car., 29 S. E. Rep. 198.

119. WILLS—Gift During Widowhood—Dower.—After certain bequests, a testator gave to his wife all the residue of his estate for her separate use, and provided that, if she should again marry, "I give, bequeath and devise to her one-third of my real estate and personal property, for herself and her heirs:" Held, that the widow was not entitled to an absolute estate in fee in either the entire real or personal estate.—BENNETT v. PACKER, Conn., 39 Atl. Rep. 739.

120. WILLS—Vesting of Estates.—Property was devised to a trustee, the income to be used for the support of himself and children until the youngest reached 21 years, when the principal was to be divided among the children, with cross limitations over in case of the death of any of them. The trustee died before the eldest son reached his majority: Held, that the eldest son, on becoming of age, could not compel payment of his share of the estate, on the ground that the postponement of the division was solely for the purpose of having the trustee receive the income for himself and children, and, this purpose having failed, the estate limited to the children became vested at once on the death of the trustee.—STREIB v. STREIB, N. J., 39 Atl. Rep. 723.

121. WITNESS—Transactions with Decedent.—Rev. St. 1895, art. 2302, providing that, in actions by executors, neither party can testify against the others to transactions with testator, unless called to testify thereto by the opposite party, will not allow defendant to testify to transactions with plaintiffs' testator, on introduction by defendant of deposition of testator relative thereto, used on a former trial.—IVEY v. BONDIES, Tex., 44 S. W. Rep. 916.